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(2)

No.

IN THE

Supreme Court of the United States

MARY ALICE GWYNN, PETITIONER

v.

JAMES F. WALKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-80655-CIV-GOLD/TORRES

MARY ALICE GWYNNE, ESQUIRE,
Appellant/Cross-Appellee,
v.
JAMES F. WALKER and GARY J. ROTELLA, ESQUIRE,
Appellees/Cross-Appellants.

OMNIBUS ORDER; AFFIRMING ALL BANKRUPTCY COURT ORDERS ON APPEAL AND CROSS-APPEAL AND CLOSING CASE

THIS CAUSE is before the Court on Appellant's appeal and Appellees/Cross-Appellants' cross-appeal of final Orders of Bankruptcy Court. Also pending are Appellant's "Motion to Supplement the Designation of Record on Appeal to Include Record Items from Dismissed Appeals Case No.: 06-80731 CIV-GOLD/TORRES, and Case No.: 08-80804 CIV-GOLD/TORRES" [DE # 15] and Appellees/Cross-Appellants' "Response to Appellant, Mary Alice Gwynn's Motion to Extend Allowed Pages of Initial Brief, Pursuant to Local Rule 87.4(E)(2) [D.E. 14]; Motion to Strike Appellant's Initial Brief for Intentional Misrepresentations to the Court; and, Motion for Sanctions Pursuant to this Court's Order Placing Parties on Notice That Court May Invoke Federal Rule of Civil Procedure 11 (D.E. 12]" [DE # 23].

I. Which Orders are being Appealed by Appellant?

The first matter is to identify which specific Orders are the subject of this appeal and cross appeal. On August 22, 2006, I issued an Order to Show Cause requiring the Appellant to explain how the Orders being appealed were final and appealable orders pursuant to 28 U.S.C. § 158 [DE # 7].

In her Response to this Court's Order to Show Cause, Appellant stated:

> [t]he Appellant is presently appealing the Court's order cited as #3 of Memorandum Order, titled Gary J. Rotella, Esq.'s Motion for Sanctions Against Mary Alice Gwynn, Esq. Pursmant to 28 U.S.C. § 1927 and 11 U.S.C. § 105 Relating to Creditor Eleanor Cole's Motion for Sanctions Against Gary J. Rotella, Esq., Pursuant to the Court Order Dated July 17, 2003 [C.P. 839]. All other orders contained in the Memorandum Order, including #1,2,4 and 5, are not being appealed. (emphasis and punctuation omitted from original). (Appellant's Response to this Court's Order to Show Cause Order, 2)

In her Response to this Court's August 22. 2006 Order to Show Cause, Appellant also conceded that all other Orders previously being appealed were non-final Orders.

On September 15, 2006, Appellant filed her Initial Brief [DE # 17]. In the Initial Brief, Appellant raises a number of legal issues related to the Bankruptcy Court's decision to deny her motion to recuse the Bankruptcy Court judge pursuant to 28 U.S.C.§ 144 and 255. On September 18, 2006, Appellant filed a "Motion

to Supplement the Designation of Record of Appeal to Include Record Items from Dismissed Appeals Case No.: 06-80731 CIV-GOLD/TORRES, and Case No.:06-80804 CIV-GOLD/TORRES." [DE # 16]. In this Motion, Appellant seeks to include a number of items related to the Bankruptcy Court's imposition of sanctions into the record on appeal.

On October 4, 2006, Appellees/Cross-Appellants filed a "Motion to Strike Appellant's Initial Brief for Intentional Misrepresentations to the Court; and. Motions for Sanctions, Pursuant to this Court's Order Placing Parties on Notice that Court May Invoke Federal Rule of Civil Procedure 11 [D.E.12]"[DE # 23]. In Appellees/Cross-Appellants' Motion, Appellees/Cross-Appellants seek to strike all or portions of Appellant's Initial Brief because Appellant "never alerted this Court that any Order, except for one (1) particular Order, was at issue in the instant Appeal." (Appellees' Motion to Strike, 5). Having reviewed the record, I conclude that these matters should be resolved prior to addressing the merits of the appeal.

Federal Rule of Bankruptcy Rule 8006 states:

> Within 10 days after filing the notice of appeal as provided by Rule 8001 (a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the

> appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

While some Circuit Courts strictly construe Bankruptcy Rule 8006, the Eleventh Circuit, however, applies a more flexible rule: "An issue that is not listed pursuant to (Rule 8006] and is not inferable from the issues that are listed is deemed waived and will not be

considered on appeal" (emphasis added). Snap-On Tools, Inc. v. Freeman (In re Freeman), 956 F2d 252,255 (11th Cir. 19992). Thus, as long as an issue is inferable, Rule 8006 "is not intended to bind either party to the appeal as to the issues that are to be presented." In re Cohoes Indus. Terminal, Inc., 90 B.R. 67, 70 (S.D.N.Y. 1988)(internal quotation marks omitted).

In determining if an issue on appeal is inferable from the original pleadings or Notice of Appeal, Judge Lawson of the Middle District of Georgia stated:

> The Eleventh Circuit has not set forth a test for determining when an issue is inferable. Therefore, adopting a mix of approaches from other courts, this Court holds that an issue not listed in a Rule 8006 Issue Statement is inferable under the following circumstances. First, the issue must have been raised in the bankruptcy court because an appellate court generally will not consider issues not adjudicated below. Harrison v. Brent Towing Co., Inc. (In re H& R Transp. Co., Inc.), 110 B. R 827, 830 (M.D.Tenn. 1980)(citing Singleton v. Wulf, 428 U.S. 106, 121). Second, and in conjunction with the previous point, the issue must not require the court to make any independent factual findings. In re H & R Transp. Co., 110 B. R. at 830. Third, the issue must present no surprise to the other litigant. See Turner v. Marshack (In re Turner) 186 B.R. 108 (9th Cir. BAP 1995). 1995). (internal citation omitted).

In re Bracewell, 322 B.R. 698, 701-02 (M.D. Ga. 2005). In evaluating the current Motions, I will employ a similar test.

In their Motion to Strike, Appellees/Cross-Appellants state:

> If the Court makes even a cursory examination of Appellant's Initial Brief, it will find that Appellant's Initial Brief is filled with substantial amounts of irrelevant and immaterial discussions and arguments, including several pages of totally improper comments and discussions as to Bankruptcy Court's character, why he allegedly should have been disqualified from the Walker Case, his alleged pervasive bias towards Gwynn in favor of undersigned, his referral of the subject Memorandum Order to The Florida Bar requesting an investigation regarding same as to Gwynn, her discussion of other allegeable misconducts exhibited by Bankruptcy Court evidencing deep seated bias against Gwynn, in favor of undersigned.

(Appellees' Motion to Strike, 9). Moreover, Appellees/Cross-Appellants argue:

> Based upon Gwynn's sense of general dishonesty with this Court and her many misrepresentation to this Court in connection with the instant Appeal; given Gwynn's dogged determination to include matters in the instant Appeal that have no place here, despite herprior representations to this Court that such matters were not a part of this Appeal; and, Gwynn's various other

> violations of Rules of Civil Procedure, Appellate Rules, Local Rules, there is only one (1) appropriate remedy for this Court to impose. Respectfully, this Court should strike Appellant's Initial Brief filed by Gwynn pursuant to its authority under Rule 11, Fed.R.Civ.P. and all other applicable Statutes and Rules and enter an award of sanctions for attorneys' fees and costs against Gwynn.

(Appellees' Motion to Strike, 16-17). In Response to Appellees/Cross-Appellants' Motion for Strike and Sanctions, Appellant argues:

> 3. In an effort to preserve all her appellate rights, Appellant had initially filed three (3) appeals. In her Reeponse(s) to this Court's Order(s) to Show Cause (1-Case No.: 06-80804, 2-Case No: 06-80731, and 3-Case No: 0680655 (the instant appeal)) the Appellant agreed with this Court and attempted to Simplot by by dismissing Appeals #06-80804 and #06-80731, and clarifying the remaining orders/issues on appeal under Case No. 06-80655.
>
> 4. In both her Response to Court's Order to Show Cause Dated September 5, 2006 and Voluntary Dismissal of Appeal filed in Case #06-80804, and her Response toCourt's Order to Show Cause Dated September 5, 2006 and Voluntary Dismissal of Appeal filed in Case #06-80804, space and her Response to Court's Order to Show Cause Dated September 5, space 2006 and Voluntary Dismissal of Appeal filed in Case #06-80731, the Appellant relied on and decided

> the Corrugated Container... (supra) case, which holds that "disqualification questions are fully reviewable on appeal from a final judgment." (See attach Exhibit #1 and two respectively) Mr. Rotella was served copies of both of these pleading upon filing.
>
> 5. Appellant also amended her Statement of Issues on Appeal and her Designation of Record Items to include the Bankruptcy Court's denial of her Motion for Recusal. (Original punctuation emphasis omitted).

Appellant's Initial Brief does not seek to appeal a single Order as she previously represented in her Response to this Court's August 22, 2006 Order to Show Cause. Rather, Appellant seeks to now challenge eight Orders of the Bankruptcy Court. A number of the Orders that Appellant seeks to appeal center on "[w]hether the Bankruptcy Court erred in denying Appellant's motion for recusal pursuant to 28 U.S.C. Sec. 144, Sec 455 and 5004." Because Appellant never has requested leave of Court to file her Amended Statement of Issues, I decline to consider the legal issues raised in her Initial Brief, unless those issues are inferable from the original issue presented in her Notice of Appeal. While Appellees/Cross-Appellants are correct that Appellant previously stated that she was only appealing one order, I nonetheless will consider those issues raised in the Appellant's Initial Brief relating to the Bankruptcy Judge's recusal (and certain other issues raised in the Appellant's Initial Brief) because those issues are inferable from the Appellant's previous filings and her Notice of Appeal. In reaching this conclusion, I place significant emphasis on the 11th Circuit's interpretation

of Bankruptcy Rule 8006 Snap-On Tools, Inc. v. Freeman (In re Freeman), 956 F. 2d 252, 255 (11th Cir. 1992) (holding that an issue that is not listed pursuant to Federal Rule of Bankruptcy Procedure 8006 and is not inferable from issues that are listed is deemed waived and will not be considered on appeal.)

Also, I base my decision on a number of other factors. First, the Bankruptcy Court fully adjudicated recusal issue. Second, the Appellees were not taken by surprise by the recusal issue because this legal issue was fully litigated in the Bankruptcy Court. Third, the consolidation of all legal issues in a single appeal in this matter aids judicial efficiency and avoids piece-meal litigation. Forth, since legal issues raised by Appellants centering on Bankruptcy Court judge's recusal are legal issues which are reviewed on a de novo basis by this Court, no further briefing by the parties is necessary.

To the extent that Appellees' Motion seek to strike portions of the Appellant's Initial Reef, Appellees' requested is DENIED. Furthermore, a review of the items Appellant seeks to include in this record via her "Motion to Supplement the designation of Record on Appeal to Include Record Items from Dismissed Appeals Case No.:06-80731 CIV-GOLD/TORRES, and Case No.: 06 – 80804 CIV-GOLD/TORRES" [DE # 15] is GRANTED. Because, I conclude that the Orders related to the Bankruptcy Court's disqualification in/or recusal are properly before this court on appeal, I conclude that the sanctions sought in Appellees' Motions for Sanctions[DE #23] are also DENIED. I turn to whether the Bankruptcy Court committed legal

error in any of the Orders on appeal and/or cross-appeal.

II. Statement of Facts With Regard to the Orders on Appeal

This case has a long an unfortunate history and I have had the opportunity to deal with these parties in the past. Appellee James F. Walker filed a petition for Chapter 7 bankruptcy relief on April 25, 2003. Appellee attorney Gary J. Rotella ("Rotella") represented D. Debtor in the bankruptcy proceedings. Appellant represented Eleanor C. Cole and Florida Precision Calipers, Inc. In the bankruptcy proceedings. Ms. Cole and Florida Precision Calipers, Inc. were the two largest creditors in the bankruptcy.

Appellants allege that some time after Debtor filed for bankruptcy, Debtor's wife, Carol Ann Walker, transferred her interest in a certain of real property located in the Bahamas to Rotella. Carol Ann Walker transferred the property to pay Rotella's legal expenses incurred in the representation of her husband in the bankruptcy proceedings. Appellant claims that the real property belonged to Debtor and was the sole asset of the bankruptcy estate.

After Carol Ann Walker transferred the Bahamian property to Rotella, Appellant filed a motion titled Eleanor C. Cole's Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Associates P.A. From Representing the Debtor (the "Motion to Disqualify") on April 21, 2004. In the Motion to Disqualify, Appellant alleged that Rotella was conflicted from representing the Debtor because Rotella became a

person with an interest in the bankruptcy estate upon receipt of the Bahamian property. Appellant further alleged that the receiver the property gave Rotella in interest adverse to the estate.

On April 23, 2004, Appellant filed a notice setting the Motion to Disqualify for hearing on April 28, 2004. The next day, on April 24, 2004, Rotella served Appellant, by fax, with the proposed Rule 9011 Motion For Sanctions related to the Motion to Disqualify. On April 26, 2004, Rotella filed a Motion to Shorten 21 Day Notice Requirement For Filing a Motion For Sanctions Pursuant to Bankruptcy Rule 9011.

The April 24, 2004 letter reads, in relevant part: "[e]nclosed under this cover is [a] Motion For Sanctions Pursuant to Bankruptcy Rule 9011 that I intend to file against both your client, Eleanor C. Cole and you. The set Rule 9011 is twenty-one (21) days from the date of this correspondence to voluntarily withdraw Creditor, Eleanor C. Cole' S. Emergency Motion To Disqualify The Law Firm of Gary J. Rotella and Associates, P.A. [From] Representing Debtor (' Motion to Disqualify'). However, given your attempt to bring this frivolous evidentiary matter on for hearing on Wednesday, April 2008, that you also find enclosed under this cover Motion to Shorten 21 Day Notice. For Filing Motion For Sanctions Pursuant To Bankruptcy Rule 9011 ('Motion to Shorten')." That same day Appellant filed a pleading entitled Eleanor C. Cole's Supplemental Memorandum of Law in Support of Emergency Motion to Disqualify the Law Firm of Gary J. Rotella Associates PA From Representing the Debtor.

On April 27, 2004, Rotella sent Appellant a second letter by fax. Attached to this letter, Rotella served Appellant with his response to the Motion to Disqualify. Rotella also informed Appellant that his response to the Motion to Disqualify was "incorporated by reference into the Motion For Sanctions Pursuant to Bankruptcy Rule 9011 consistent with my correspondence under cover of April 24, 2004."

The Bankruptcy Court heard oral argument on the Motion to Disqualify on April 28, 2004, seven days after Appellant initially filed the Motion to Disqualify. After hearing arguments from the parties, the Bankruptcy Court denied the Motion to Disqualify. The Bankruptcy Court concluded that Eleanor C. Cole, as a creditor, did not have standing to assert any potential conflict of interest on behalf of any other members of the Debtor's family, including Debtor's uncle and brother. Further, the Bankruptcy Court concluded that Eleanor C. Cole's allegations that Mr. Rotella may be awareness in the Bankruptcy proceeding was premature. Lastly, the Bankruptcy Court ruled that Rotella's interest in the Bahamian property my preclude him from representing Carol Ann Walker in an adversary proceeding, however, that issue is not before the court because no adversary proceeding had been filed.

The Bankruptcy Court also heard oral argument on Rotella's Motion to Shorten 21 Day Notice Requirement For Filing a Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on April 28, 2004. The Bankruptcy Court orally denied the Motion to Shortened. In denying the Motion to Shorten, the Bankruptcy Court stated: "I'm going to deny it because it's moot, and frankly, Mr. Rotella, at this point, in that

I've ruled on the motion under Rule 11. If you wish to seek sanctions under any other authority, you may do so." (Emphasis added).

On May 12, 2004, the Bankruptcy Court issued a written Order Denying Motion to Shorten 21 Day. To File Motion For Sanctions Pursuant to Bankruptcy Rule 9011. Thereafter, on May 18, 2004, Rotella formally filed his Motion For Sanctions Against Mary Alice Gwynn, Esquire. That same date, appellant, on behalf of Eleanor C. Cole, filed a Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, PA (the "Renewed Motion to Disqualify"). The Court held a hearing on the Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, PA on May 28, 2004. I note that the written order which follow the Bankruptcy Court's oral ruling on the motion to shorten failed to include any specific reference to the Bankruptcy Court's admonition that Appellee could move for sanctions "under any authority" other than rule 9011. This may explain why that Court later granted award of sanctions under Rule 9011 after the same request was denied and expressly prohibited by the Bankruptcy Court or a late on April 28, 2004.

At the May 28, 2004 hearing, the Bankruptcy Court orally denied the Renewed Motion to Disqualify. At the hearing, the Bankruptcy Court stated: "I agree. I am going to grant your request, reserve on the amount of attorney's fees. I find that she did not have standing whatsoever to raise the issues that she did in the original motion. She cannot get around Rule 11 by filing a renewed or an amended motion that restates the same grounds and then a couple of extra grounds,

which subsequently I have found to be meritless since I dismissed the adversary proceeding, but as to the original motion, I hereby award attorney's fees." (Emphasis added).

The Bankruptcy Court awarded Appellee sanctions under Rule 9011 at the May 28, 2004 hearing after he verbally denied that request on April 28, 2004. Further, he granted Appellee Rule 9011 sanctions after he had already denied the Emergency Motion to Disqualify upon which the Rule 9011 Motion for Sanctions was based. The Bankruptcy Court entered his written Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on June 15, 2004. Thus, the Bankruptcy Court confused an already complicated and contentious matter.

On April 6, 2005, Appellant filed a Motion to Amend, Correct or Withdraw the Court's Order Granting the Debtor's Motion For Sanctions Pursuant to Rule 9011 and Rule 60 of the Federal Rules of Civil Procedure. The Bankruptcy Court denied the Motion on April 8, 2005. Appellant also filed a Motion to Strike or Dismiss Debtor, James F. Walker's Motion For Sanctions Against Mary Alice Gwynn Pursuant to Bankruptcy Rule 9011 For Failure to Abide By Rule 11 of the Federal Rules of Civil Procedure. The Bankruptcy Court also denied this motion on May 8, 2005.

On April 21, 2005, the Bankruptcy Court held a hearing to determine the amount of sanctions to which Appellee was entitled pursuant to his earlier Order Granting Motion For Sanctions Pursuant to Bankruptcy Rule 9011 on June 15, 2004. At the hearing, Appellate disputed Rotella's contention that he properly complied

with safe harbor provision in Rule 9011 and she vigorously disputed the amount of sanctions Appellee claimed he incurred. In response to Appellant's argument that Appellee failed to comply with the safe harbor provision of Rule 9011, Appellee discounted the importance of the safe harbor provision. Appellee argued "I would also like to point out to the court, this 21 day thing which we're getting hung up on, sometimes also the Court has inherent power under 28 U.S.C. Sec. 1927 to sanction any attorney...To the extent necessary, Judge, we would make an ore tenus motion for that application". (Emphasis added). The Court granted Appellee's request for sanctions under Rule 9011 alone. The court entered a Final Judgment awarding Appellee $80,572.50 in sanctions against Appellant. This matter was the subject of a previous appeal that was pending before this Court. On April 4, 2006, I entered and Order Vacating Final Judgment of Bankruptcy Court and remanded this matter back to the Bankruptcy Court based upon the Bankruptcy Court's award of sanctions pursuant to Bankruptcy Rule 9011.

At the Oral Argument on this appeal and cross-appeal held on March 2, 2007, the parties stated that the Bankruptcy Court had amended the amount of sanctions imposed on Appellants pursuant to 28 U.S.C. Sec 1927 several times over the course of the bankruptcy proceeding. The record reflects on August 9, 2005, the Bankruptcy Court entered its Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the court's Order of July 17, 2003. In that

Order, the Bankruptcy Court awarded Appellees/Cross-Appellants sanctions against Appellant in the amount of $39,057.50. Appellees/Cross-Appellants requested $99,402 in sanctions pursuant to 28 U.S.C. Sec 1927.

On August 29, 2005, the Bankruptcy Court entered its Appendix To Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating to Creditor, Eleanor C. Cole' S. Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. On October 7, 2005, because the Bankruptcy Court had mistakenly liquidated the amount of sanctions without a separate evidentiary hearing entered, it entered its Order Vacating Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating To Creditor Eleanor C. Cole' S. Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. Also, on October 7, 2005, the Bankruptcy Court entered an Amended Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec 1927 and 11 U.S.C. Sec 105 Relating To Creditor, Eleanor C. Cole's Motion For Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003.

On December 16, 2005, Rotella prepared an Interim Statement dated December 16, 2005 which included as Exhibit "N" and introduced into evidence at the February 16, 2005. Exhibit "N" outlined Appellees/Cross-Appellants' alleged billable time and expenses for March 16, 2005. On February 16, 2006, the

Bankruptcy Court conducted its evidentiary liquidation hearing on Appellees/Cross-Appellants' Motion for Sanctions. Appellant allegedly walked out of Court and Appellees/Cross-Appellants presented evidence. The April 26, 2006 Memorandum Order was entered, wherein the Amended Order Granting Sanctions Against Gwynn was vacated and Appellee/Cross-Appellants' Motion for Sanctions was granted, with an award of sanctions entered therein against Appellant in Appellees/Cross-Appellants' favor in the amount of $14,000.

While the issue of the award of Bankruptcy Rule 9011 sanctions was on appeal before this Court, the parties continue to fight over several other issues in the underlying Bankruptcy Court. On February 6, 2006 Appellant filed her Emergency Motion for Recusal along with supporting Affidavit. Also on February 6, 2006, Appellant filed an Emergency Motion to Stay the Febrauary 6, 2006 hearing on the amount of sanctions to be awarded pursuant to Appellee/Cross-Appellants Renewed Motion for Sanctions filed on April 21, 2005. On February 8, 2006, Appellant filed her first affidavit in support of her Motion for Recusal. On February 10, 2006, the Bankruptcy Court entered its Order Denying Mary Alice Gwynn's Emergency Motion for Recusal and Denying Emergency Motion to Stay the Hearing on Debtor's Renewed Motion for Sanctions. On February 10, 2006, Appellant filed her Emergency Motion for Consideration of the Court's Order Denying Mary Alice Gwynn's Emergency Motion for Recusal and Denying Emergency Motion to Stay the Hearing on Debtor's Renewed Motion for Sanctions. On February10 2006, Appellant filed her Second Supplemental Affidavit in support of her Motion for

Recusal and her Motion for Reconsideration, which was denied by the Court on February 14, 2006.

On February 16, 2006, the Bankruptcy Court conducted a hearing on the amount of sanctions to be awarded pursuant to Appellee/Cross-Appellants Renewed Motion for Sanctions. On February 24, 2006, Mr. Rotella filed 2 ex parte Motions for Entry of Break Order for Appellant's law office and homestead. On February 27, 2006, the Bankruptcy Court granted the ex parte Motions to break into and enter Appellant's law office and homestead in aid of execution of the Bankruptcy Court's award of a previous judgment for Rule 9011 sanctions against Appellant. On February 28, 2006, a hearing was held on Appellant's Emergency Motion for Restraining Order, and response to the ex parte break and and entry Orders, which was denied by the Bankruptcy Court.

On April 10, 2006, the Bankruptcy Court entered a Sua Sponte Order Directing Appellant to File Sworn Certification of Qualifications to Practice Before the Bankruptcy Court. On April 13, 2006, Appellant filed her Motion for Reconsideration of Court's Sua Sponte Order Directing Appellant to File Sworn Certification of Qualifications to Practice Before the Bankruptcy Court. On April 17, 2006 Appellant filed her Sworn Certification of her Qualification to Practice in front of the Bankruptcy Court.

On April 26, 2006, the Bankruptcy Court entered its Memorandum Order awarding sanctions to Debtor's counsel pursuant 28 U.S.C. Sec 1927 against the Appellant and issued an Order to Show Cause why Mary Alice Gwynn Should Not Be Suspended From

Practicing Before the Bankruptcy Court, Suspended or Otherwise Disciplined Pursuant to Local Rule 2090(2). On April 26, 2006, the Bankruptcy Court also entered its Final Judgment against Appellant, awarding $14,000 in sanctions to Debtor's counsel. The same day, the Bankruptcy Court, through his law clerk, sent a letter to the Florida Bar requesting an investigative file be opened purusuant to the Court's Memorandum Order of the same date. On May 5, 2006, Appellant filed her Motion to Stay Execution of Final Judgment, which was denied on June 8, 2006.

On May 5, 2006 the Bankruptcy Court entered its Sua Sponte Order Directing Mary Alice Gwynn, Esquire To Stop Filing Notices of Filing. On May 22 2006, Appellant filed her Response to the Court's Order to Show Caused responding to the Bankruptcy Court's question why the Appellant should not be suspended or disciplined pursuant to Local Rule 2090(2). On May 26, 2006, the Court held a hearing on Appellant's Emergency Motion to Stay Final Judgment and the Court's Motion to Show Cause and Appellant's Motion for Reconsideration of the Court's Sua Sponte Order Correcting Mary Alice Gwynn, Esquire to Stop Filing Notices Of Filings. On June 7, 2006, the Bankruptcy Court entered its Order Denying Mary Alice Gwynn's Motion for Reconsideration of the Court's Sua Sponte Order imposing sanctions and striking several of Appellant's filings. On June 27, 2006, the Bankruptcy Court entered its Order Denying Relief Requesting and Mary Alice Gwynn's Amended Reply. July 7, 2006, Appellant filed her Motion for Evidentiary [hearing] on All Issues Raised in Mary Alice Gwynn's Amended Reply, which was denied. Thereafter, Appellant filed this is an appeal and Appellees/Cross-Appellants filed

their appeal of certain Orders. The Orders on cross-appeal will be discussed below.

III. Standard of Review

The Bankruptcy Court's findings of facts should not be set aside unless they are clearly erroneous. Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.), 904F. 2D 588, 593 (11th Cir. 1990); and In re: T&B Gen. Contracting, Inc., 833 F2D 1455, 1458 (11th Cir. 1987). A finding is clearly erroneous when although there is evidence to support it, the reviewing court, after weighing the entire evidence, is left with a definite and firm conviction that a mistake has been committed. Anderson v. City of Bessemer City, N.D., 470 US 564, 573 (1985). According to that standard, this court may reverse if it's "review of the record as a whole leaves [it] with the definite and firm conviction that a mistake has been committed." In Re: Monetary Group, 2 F. 3d 1098, 1106 (11th Cir. 1993) (quoting to United States v. US Gympsom Co., 333 US 364, 395 (1948)). Conclusions of law, on the other hand, are reviewed on a de novo basis. Olympia & York Florida Equity Corp. v, The Bank of New York (In re Holywell Corp.), 913 F. 2D873, 879 (11th Cir. 1990). Conclusions of law, mixed issues of law and fact, "ultimate facts" are all subject to de novo review. In Re: Cohen Chase & Sandborg Corp., 904 F2D 593; In re: Sublett, 895 F2D 1381, 1383 (11th Cir. 1990); and In re: Marks, 131 B.R. 220, 222 (S.D> Fla. 1991). As to questions of law, a district court should independently examine the law and draw its own conclusions after applying the law to the facts. In re Empire for Him, Inc., 1 F. 3 1156, 1159 (11th Cir. 1993).

IV. Legal Analysis

The parties' arguments can be summarized as follows. Appellant argues that the "lower court's reliance on 28 U.S.C. 1927 as authority to impose sanctions in the instant case was legally incorrect." Alternatively, Appellant argues that even if application of section 1927 was correct, the requirements of the same have not been met as the court's legal conclusions and factual determinations with regard to her behavior and amount of sanctions are not supported by the record. Additionally, Appellant argues that the Bankruptcy Court erred in denying her Motion to Recuse pursuant to 28 USC Sec 144. In response, Appellees/Cross-Appellants argue that the Bankruptcy Court's "award of sanctions against Appellant in the amount of $14,000 constitutes an overwhelming abuse of its discretion to impose sanctions, and that said award was made in error, and in that the amount of the award, to wit: $14,000 is grossly insufficient and inadequate, as a matter of fact and law, based upon the well-documented record..." Appellees/Cross-Appellants also argue that this Court should award them $281,917.02 as sanctions against Appellant.

On cross-appeal, Appellees/Cross-Appellants argue that Bankruptcy Court erred as a matter of law in denying their "Amended Motion for Attorneys' Fees and Costs against Eleanor C. Cole and Mary Alice Gwynn" when it ruled that Bankruptcy Rule 7037, rather than that court's inherent powers is the appropriate authority to reply upon in this matter. Additionally, Appellee/Cross-Appellants argue that the Bankruptcy Court erred as a matter of law in denying "Debtor's Amended Motion for Attorneys' Fees and Costs against Eleanor C. Cole and Mary Alice Gwynn as to Mary Alice Gwynn" when it ruled that there had

been no evidence presented that Cole's discovery conduct was carried out at Appellant's direction or upon Appellant's advice.

A. Bankruptcy Court Did Not Abused its Discretion When It Awarded Sanctions Against Appellant Pursuant to 28 U.S.C. Sec 1927 in the Amount of $14,000

Section 1927 of Title 28 of the United States Code provides as follows:

> Any attorney or other person admitted to conduct such cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

At the oral argument on this appeal and cross-appeal held on March 2, 2007, the parties stated that the Bankruptcy Court had amended the amount of sanctions imposed on Appellant pursuant to 28 U.S.C. Sec. 1927 several times over the course the bankruptcy proceeding. The record reflects that on August 29, 2005, the Bankruptcy Court entered its Order Granting Motion for Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec. 1927 and 11 U.S.C. Sec. 105 Relating to Creditor, Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. On October 7, 2005, because the Bankruptcy Court had mistakenly liquidated the amount of sanctions without a

separate evidentiary hearing entered, it entered its Order Vacating Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec. 1927 and 11 U.S.C. Sec. 105 Relating To Creditor Eleanor C. Cole's Motion for Sanctions Against Gary J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003. Also, on October 7, 2005, the Bankruptcy Court entered and Amended Order Granting Motion For Sanctions Against Mary Alice Gwynn, Esquire Pursuant to 28 U.S.C. Sec. 1927 and 11 U.S.C. Sec. 105 Relating To Creditor, Eleanor C. Cole' S. Motion For Sanctions Against Erie J. Rotella, Esquire Pursuant to the Court's Order of July 17, 2003.

On December 16, 2005, Rotella prepared an Interim Statement dated December 16, 2005 which included as Exhibit "N." Exhibit "N" outlined Appellees/Cross-Appellants' alleged billable time in expenses forward from March 16, 2005. On February 16, 2006, the Bankruptcy Court conducted its evidentiary liquidation hearing on Appellees/Cross-Appellants' Motion for Sanctions. Appellant allegedly "walked out" of Court and Appellees/Cross-Appellants' presented evidence. The April 26, 2006 Memorandum Order was entered, wherein the Amended Order Granting Sanctions Against Gwynn was vacated and Appellees/Cross-Appellants Motion for Sanctions was granted, with the award of sanctions entered therein against Appellant in Appellee/Cross-Appellants' favor in the amount of $14,000.

There is no question that the Bankruptcy Court has the authority to award sanctions against Appellant pursuant to 28 U.S.C. Sec. 1927 pursuant to its jurisdictional relationship with the District Court. In

Re Lawrence, 2000 WL 33950028 *4 (Bankr. S.D. Fla. 2000) (accord Huff v. Brooks (In re Brooks), 175 B.R. 409, 412 (Bankr. S.D. Ala. 1994)). The issue is whether the Bankruptcy Court erred as a matter of law in awarding the sanctions and whether the amount of sanctions are reasonable.

The Eleventh Circuit has explained that section 1927 is a "sanctioning mechanism... aimed at the unreasonable and vexatious multiplication of proceedings." Byrne v. Nezhat, 261 F3D 1075, 1106 (11th Cir. 2001). Moreover, section 1927 differs slightly from Fed. R. Civ. P. 11 in that Rule 11 is aimed primarily at pleadings, while section 1927 aims to prevent dilatory tactics throughout the litigation. Id. Another difference from Rule 11 and is that "awards pursuant to section 1927 may be imposed only against the offending attorney; clients may not be saddled with such awards". Id. (quoting United States v. Int'l B'hd of Teamsters, Chauffers, 948 F2D 1338, 1345 (2nd Cir. 1991)).

Section 1927 is "penal" in nature and, thus its provisions must be strictly construed. Peterson v. BMI Refractories, 124 F3D 1386, 1395 (11th Cir. 1997). There are three (3) essential requirements that must be satisfied with respect to an award of sanctions under Section 1927. Id. at 1396. The first requirement is that the attorney in question must engage in "unreasonable and vexatious" conduct. Id. Second, such conduct must multiply the proceedings. Id. Third, "the dollar amount of the sanction must bear a financial nexus to the excess proceedings, i.e., the sanction may not exceed the 'costs, expenses, and attorneys' fees reasonably incurred because of such conduct.'" Id. (citing 28 U.S.C. Sec. 1927).

In Peterson, the 11th Circuit noted: "There is little case law in this circuit concerning the standard applicable to the award of sanctions under section 1927." Peterson, 124 F3d at 1399. The 11th Circuit recently acknowledged that its "cases are perhaps somewhat unclear [with respect to the requirements of section 1927]; either they require subjective bad faith, which may be inferred from reckless conduct, or they merely require reckless conduct, which is considered 'tantamount to bad faith.'" Cordoba v. Dilliard's, Inc., 419 F3d 1169, 1178 (11th Cir. 2005).

In an Order dated April 26, 2006, the Bankruptcy Court evaluated each of the factors relevant for evaluating whether section 1927 sanctions should be imposed. First, the Bankruptcy Court reviewed Appellant's behavior during the course of the bankruptcy proceeding and concluded that Appellant's conduct is tantamount to bad faith.

On this point, that Bankruptcy Court held:

> [Appellant's] conduct has been sufficiently reckless to warrant a finding of conduct tantamount to bad faith. The court further finds that her frivolous claims were prosecuted for the purposes of harassing her opponent such that he conduct has been tantamount to bad faith. [Appellant] failed to conduct even the most routine investigation before lodging completely unfounded allegations regarding Rotella's honesty and candor with the Court. It is bad faith and an abuse of process for [Appellant] to lodge unfounded and un-investigated allegations that opposing counsel perpetrated a fraud upon

> the Court and was generally dishonest, then withdraw the pleadings containing those allegations at the hearing without notice to Rotella, and maintain that based upon that withdrawal she should not be sanctioned.

The Bankruptcy Court also carefully considered the amount of sanctions to be imposed against Appellant. In deciding on the amount of sanctions, the Bankruptcy Court considered the multiplication of the proceeding caused by Appellant's behavior. Also in rendering a decision on the amount of sanctions to impose, the Bankruptcy Court also considered Appellees/Cross-Appellants' request for sanctions. On this point, and the Bankruptcy Court stated:

> Rotella's Motion for Sanctions originally sought $99,402.50 for fees and costs allegedly incurred in this matter through March 18, 2005. He now seeks fees and costs in the amount of $241,270 through February 8, 2006. Indeed, Rotella has represented to the Court that the fees and costs incurred are actually several times more than the amount he seeks here. In addition, the Second Amended Discovery Sanctions Motions seeks $57,478.25 space and Rotella's sanctions motion for Cole's Motion to Disqualify sought $80,572.50. The amounts sought by Rotella juxtaposed against the estate having received total funds of $56,028.20 through December 31, 2005, compels the Court to ask what has gone wrong? Taken as a whole, the grossly excessive amount of sanctions sought by Rotella shocks this Court's conscience.

Moreover, the Bankruptcy Court found that Appellees/Cross-Appellants' responses to Appellant's "attacks were disproportionately 'over the top'" and that Appellees/Cross-Appellants had been using a "sledge hammer to kill a flea." Then, the Bankruptcy Court correctly stated, "sanctions imposed pursuant to section 1927 'must bear a financial nexus to the excessive proceedings, i.e., the sanction may not exceed the 'costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The Bankruptcy Court found that "Rotella shares some fault for the unreasonable multiplication of these proceedings as a consequence of his unmeasured, and at times unnecessary, response to [Appellant]." The Bankruptcy Court also conclude that had Appellees/Cross-Appellants had a more measured response, the Court's best estimate for the reasonable amount of the excess costs, expenses, and attorney's fees incurred because of Appellant's having unreasonably and vexatiously multiplied the proceedings would be 40 hours at $350 per hour. The Bankruptcy Court then gave a detailed break-down of the hours that it should have taken Appellees/Cross-Appellants to respond to Appellant. Lastly, the Bankruptcy court stated:

> The Court finds that award in the amount of $14,000 is reasonable and appropriate pursuant to 28 U.S.C. Sec. 1927 for the excess proceedings necessitated by [Appellant's] unreasonable and vexatious conduct. The Court also finds that imposition of sanctions against [Appellant] in the amount of $14,000 is appropriate pursuant to 11 U.S.C. Sec. 105 and Court's inherent power 'to manage its affairs which necessarily includes the authority to impose reasonable and appropriate

> sanctions upon errant lawyers practicing before it." (Citations omitted).

On appeal, Appellant bears the burden of demonstrating that the Bankruptcy Court's imposition of sanctions was an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 US 384 (1990) (appellate courts should give great deference to the decision of courts on the "front lines" of litigation to impose Rule 11 sanctions in order to free appellate courts from reevaluating evidence and reconsideration facts already weighed and considered by the trial court). Id. at 403-05. United States v. Frazier, 387 F3D 1244, 1259 (11th Cir. 2004) (en banc) "the application of an abuse-of-discretion review recognizes the range of possible conclusions the trial judge may reach. [W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard.") See also, Schwartz v. Millon Air, Inc., 341 after 3D 1220, 1225 (11th Cir. 2003) (court reviews sanctions under 28 U.S.C. Sec. 1927 for abuse of discretion); and Barnes v. Dalton, 158F3D 1212, 1214 (11th Cir. 1998) (court reviews sanctions under inherent powers for abuse of discretion) and Cooter & Gell v, Hartmarx Corp., 496 US 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law....").

Having reviewed the record and the Bankruptcy Court's analysis, I conclude that Appellant has not met her burden of proving that the Bankruptcy court's imposition of sanctions was an abuse of its discretion. Furthermore, I cannot conclude that the Bankruptcy Court's factual determinations with regard to the

amount of time that should have been spent in responding to Appellant's Motion was clearly erroneous. Accordingly, the Bankruptcy court's imposition of $14,000 in sanctions against Appellant is hereby AFFIRMED.

Likewise, I conclude that Appellees/Cross-Appellants' arguments are without merit as well because their arguments insufficiently attacked the Bankruptcy Court's factual findings with regard to the amount of time estimated to reasonably respond to Appellant's behavior. As stated above, the Bankruptcy Court's factual determinations with regard to the amount of sanctions to impose against Appellant were not clearly erroneous and it did not apply incorrect legal standards. Thus, I AFFIRM the Bankruptcy Court's orders with regard to the imposition of sanctions pursuant to 28 U.S.C. Sec. 1927 against Appellant in the amount of $14,000.

B. The Bankruptcy Court Did Not Commit Any Legal Error In Denying Appellant's Emergency Motion For Recusal.

Appellant argues that the Bankruptcy Court committed legal error in denying Appellant's Emergency Motion for Recusal. Specifically, Appellant stated that the grounds for refusal are as follows:

> 1) the court accepted carte blanche all proposed order from Appellee, which included finds that were both favorable to his position to the detriment of appellant. Moreover, the new findings were never articulated in the ore tenus rulings in open court; 2) the court sua sponte

> amended its original order on two separate occasions, to ensure that appellant would be sanctioned under any available legal theories; 3) the court issued to ex parte "break and enter orders" into appellant's home and law office, which would have allowed federal marshals on bright authority to seize any and all property of appellant to satisfy Appellee's previous judgment for sanctions; 4) filing Appellee's complaints against the appellant to the Florida Bar, the court likewise filed complaints.

Moreover, Appellant argues that the Bankruptcy Court's Order is flawed in that it only addresses personal bias, which must come from extra judicial source rule.

Section 455 creates two primary reasons for recusal. See 28 U.S.C. Sec. 455(s)-(b).Under subsection 455 (a), a judge to recuse himself or herself under section 455(a) one there is an appearance of impropriety. See Id. Sec 455(a). Section 455(a) provides, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Id. "The very purpose of section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety when ever possible." Lileberg v. Health Servs. Acquisition Corp., 46 US 47, 865 (1988). Thus, the standard of review for a second 455(a) motion "is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds of which recusal was sought would entertain a significant doubt about the judge's impartiality," Parker v. Connors Steel Co., 855 F. 2d 1510, 1524 (11th Cir. 1988), and any doubts

must be resolved in favor of recusal, United States v. Kelly, 888F2D732, 745 (11th Cir. 1989). However, a party's complaints regarding "judicial rulings, routine trial administration efforts, and an ordinary admonishments (whether or not legally supportable) to counsel" are not sufficient to require recusal. Liteky v. United States, 510 US 540, 556 (1994). The exception to this rule is "when a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party." Hamm v. Board of Regents, 708F2D 647, 651 (11th Cir. 1983). Mere "friction between the court and counsel," however, is not enough to demonstrate quote pervasive bias." Id.

Subsection 455(a) provides that a judge shall also disqualify himself or herself in the following circumstances:

> (1) Where he has a personal bias or prejudice concern a party, or personal knowledge of disputed evidentiary facts concerning proceeding;
>
> (2) Where in private practice he served as [a] lawyer in the matter of controversy, or a lawyer with whom he previously practiced law served during such Association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning that;
>
> (3) Where he has served and governmental appointment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion

concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected it by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

28 U.S.C. Sec. 455(b)(1)-(5).

As of the Eleventh Circuit has stated, an appellate court reviews the decision of a judge not to recuse himself for abuse of discretion and an appellate court will affirm that decision "unless we conclude that the impropriety is clear and one which would be recognized by all objective, reasonable persons." United States v.

Bailey, 175F3D966, 968 (11th Cir. 1999). In light of these principles in the record before me, I reject Appellant's argument that the Bankruptcy Court should have recused himself. Indeed, I conclude that no reasonable basis exists in the record for Appellant's accusation of bias on the part of the Bankruptcy Court judge. In reaching this decision, I have closely examine each of the Appellant's allegations. First with regard to the proposed Orders which were allegedly "ghost-written." While the appellate courts have repeatedly condemned the use and dangers of proposed orders drafted by parties, the practice in itself is not evidence of a bias on the part of the Bankruptcy judge in question in this matter. Second, the evidence in the record does not demonstrate that the Bankruptcy Judge ignored the law and/or the constitutional rights of Appellant in favor of the Appellee Mr. Rotella. Third, the Bankruptcy Court's letter to the Florida Bar describing Appellant's behavior during the course of this matter does not in itself demonstrate bias of the court. See generally 5-H Corp. v. Padovano, 708 So. 2d 2D 244 (Fla. 1997) (noting that a judge's mere reporting a perceived attorney lack of professionalism to Florida Bar, in and of itself, is legally insufficient to support judicial disqualification.) Finally, the Bankruptcy Court's issuance of 2 ex parte "break and enter orders" into a Appellant's home and law office, which would have allowed federal marshals authority to seize any and all property of Appellant to satisfy Appellee's previous judgment for sanctions does not reflect a bias of the Bankruptcy Court judge against Appellant.

If the Bankruptcy Court was at times caustic in tone, that attitude reflects the judge's exasperation with Appellant's as well as the Appellees/Cross-Appellants' pattern of rude and unprofessional conduct displayed

throughout this underlying proceeding. The underlying case was not a complicated matter, however, the actions of all parties produce thousands of pleadings. Even if the bankruptcy court's exasperation with appellant could be characterized as "friction between the court and counsel," such friction, as I have pointed out, is not enough to show "pervasive bias" working recusal. Hamm, 708 F.2d a t 651.

I next examine whether the Bankruptcy Court correctly applied 28 U.S.C. Sec. 144. Once a party follows a timely and sufficient affidavit that the trial judge is personally prejudiced against him, 28 U.S.C. Sec. 144 demands the trial judge's recusal. While the trial judge may not pass upon the truthfulness of the affidavit's allegations, he or she must determine whether the facts that out in the affidavit are legally sufficient to require recusal. Davis v. Board of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975). The basis for legal sufficiency adopted by the 11th Circuit requires defendant to show:

> 1. The facts are material and stated with particularity.
>
> 2. The facts are such that, if true they would convince a reasonable person that a bias exists.
>
> 3. The fact showed the bias is personal, as opposed to judicial, in nature.

Parrish v. Board of Commissioners of Alabama State Bar, 524 F. 2d 98, 100 (5th Cir. 1975).

To be disqualified under 28 U.S.C. Sec. 144, the alleged bias and prejudice must stem from an extrajudicial source. United States v. Grinnell Corp., 384 US 563, 583 (1966); Davis v. Board of School Commissioners, 517 F. 2d at 1051 (origin of alleged bias was language in order then before the court and an opinion in a previous case). See, e.g., Berger v. United States, 255 US 22 (1921) (prejudice against German-Americans). The law of this Circuit is clear that "[t]o warrant recusal under Sec. 144 "must demonstrate that the alleged bias as personal as opposed to judicial in nature.... The alleged bias must stem from an extrajudicial source and result in opinion on the merits on some basis other than what the judge learned from his participation in the case. Thus, a motion for disqualification may not ordinarily be based on the judge's rulings in the same case." United States v. Meester, 762 F. 2d 867, 884 (11th Cir. 1985) (citations omitted); see also Loranger v. Stierheim, 10 F. 3d 776, 780 (11th Cir. 1994) ("as a general rule, a judge's rulings in the same case are not valid grounds for recusal"). Mere adverse rulings do not constitute the sort of pervasive bias and necessitates recusal. Loranger, 10 F. 3d 781.

A careful review of Appellant's Motion reveals that she sought recusal merely because she was unhappy or disagreed with the Bankruptcy Court's Orders including the imposition of sanctions against her in the issuance of the break-and Orders to impose sanctions previously awarded. However such a showing falls well short of the necessary threshold for recusal or disqualification of the Bankruptcy judge. See Draper v. Reynolds, 369 F. 3d 1270, 1282-82 (11th Cir. 2004) (district court did not err in denying motion to disqualify under Sec. 144 were movant presented no

evidence that judge harbored a personal bias or prejudice either against him or in the favor of any adverse party).

Under the standard review described above, none of Appellant's complaints regarding the Bankruptcy Court's actions requires recusal under 28 U.S.C. Sec. 455(a) or (b) or 28 U.S.C. Sec. 144. The rulings against an admonishment of Appellant do not demonstrate bias and do not give rise to a significant or reasonable doubt about the Bankruptcy Court's impartiality. U.S. v. Patti, 337 F. 3d 1317, 1321 (11th Cir. 2003). Specifically, I conclude that the Bankruptcy Court properly denied the motion to disqualify pursuant to 28 U.S.C. Sec. 144 because the alleged bias was judicial rather than personal and because the facts and the affidavit would not have convince a reasonable person of the existence of personal bias against Appellant. In reaching this conclusion, I have reviewed each of Appellant's grounds for recusal and I conclude that none of the proffered reasons are sufficient for recusal. Thus, I conclude that the Bankruptcy Court did not err as a matter of law when it did not recuse and all Orders related to this issue are AFFIRMED.

C. Appellees/Cross-Appellants' Cross-Appeals Are Without Merit

Appellees/Cross-Appellants argue that the Bankruptcy Court improperly entered both Order (1) in the April 26, 2005 Memorandum Order wherein it denied Appellees' Second Amended Discovery Motion and Order (2) in the "Ordered and Adjudged" clause contained at page 3 of the Final Judgment entered on April 26, 2006, wherein the Bankruptcy Court denied

Appellee Walker's Second Amended Discovery Sanctions Motions. Specifically, Appellees/Cross-Appellants argue that the Bankruptcy Court erred as a matter of law and/or fact when it entered its Order Denying Appellees/Cross-Appellants Second Amended Discovery Sanctions Motion on the basis thatBankruptcy Rule 7037, rather than the Bankruptcy Court's inherent power provides the basis for the imposition of sanctions. Additionally, Appellees/Cross-Appellants argue that the Bankruptcy Court erred when it concluded that there had been no evidence presented that Cole's obstructive discovery conduct was Appellant's fault.

In order to determine whether the Bankruptcy Court arrived at a decision granted in the law and facts, I examine the underlying facts related to the Orders being appealed by Appellees/Cross-Appellants. On February 23, 2004, Cole's filed a Motion for a Protective Order with three Affidavits from her treating physician stating that a deposition at that time was detrimental to Cole's health and against medical advice. On March 29, 2004, Appellee James F. Walker filed his Motion for Attorney's Fees and Costs against Cole. On May 25 2004, Appellee James F. Walker filed his Amended Motion for Attorney's Fees and Costs Against Eleanor Cole. On May 28 2004, the Bankruptcy Court held the hearing on very's Motions, which included Appellees/Cross-Appellants' Motion and Amended Motion for Attorney's Fees and Cost Against Eleanor Cole. At the May 28th 2004 hearing on the Motion and Amended Motion, Appellants/Cross-Appellee objected to the Appellees/Cross-Appellants' Amended Motion for Attorney's Fees and Costs Against Eleanor Cole. Additionally, Appellant/Cross-Appellee attacked the

amount of fees demanded. At the May 28 2004 hearing, the Bankruptcy Court rescheduled the hearing to give Appellant/Cross-Appellee time to review and prepare a response to the Motions.

On June 7, 2004, Appellant/Cross-Appellee withdrew from representing Cole and was substituted by new counsel. On April 21, 2005, Cole's new counsel who also withdrew some two weeks earlier was present and consented to Mr. Rotella's statement to the Bankruptcy Court that Cole instructed her new counsel that she could not and would not sit for a deposition. Subsequently, sanctions were posed against Cole.

At the April 21, 2005 hearing, Mr. Rotella stated:

> At the hearing on April 6th, Judge, you stated on the record, 'And I have reviewed A, B, and C, the amount of fees are reasonable. They were necessary and were properly incurred in the defense of this action in the prosecution of your positions, and I will award the fees requested therein and as to Ms. Cole, in addition to striking her claims." I believe that your same thinking should apply here, Judge, as we should be able to move through these two motions expeditiously with the application of that thinking.

At the April 21, 2005 hearing, Mr. Rotella was attempting to have the same amount of fees previously awarded pursuant to his default against Cole, award against Appellant/Cross-Appellee. Also at the April 21, 2005 hearing, Appellant/Cross-Appellee argued that because she was not prepared to defend against the Motions because she was not placed on notice that

Appellees/Cross-Appellants were seeking fees and costs against her. Following the hearing on April 21, 2005, Appellees/Cross-Appellants faxed to the Appellant/Cross-Appellee's Amended Motion for Attorney's Fees and Cross Against Creditor Eleanor C. Cole and Mary Alice Gwynn, Esquire denying Debtor's Amended Motion for Attorney's Fees and Cost Against Creditor Eleanor C. Cole and Mary Alice Gwynn, Esquire and part. At page 18-19 of the April 26, 2006 Memorandum Order, the Bankruptcy Court made the following ruling:

> "The Court previously ruled that Cole's refusal to appear and testify at her deposition while under subpoena, or to otherwise participate in discovery, after 20 months of scheduling and rescheduling, was willful and in complete disregard of the Court, its law and its parties involved in this proceeding. (Cole Default Order at page 17). However, the Court finds that there was no evidence presented that Cole's obstructive of discovery conduct was Gwynn's fault, having either been carried out at Gwynn's directions, or upon Gwynn's advice. Absent evidence of Gwynn's culpability in advancing Cole not to appear and testify at her deposition, or to otherwise not participate in discovery, there exists no basis pursuant to Bankruptcy Court 7037, or pursuant to any other authority to assess sanctions against Gwynn..."

It is well-established that a Bankruptcy Court's findings of fact will not be set aside unless they are clearly erroneous. In re Chase & Sanborn Corp., 904 F. 2d 588, 593 (11th Cir. 1990). By that standard, this Court

may reverse if "review of the record as a whole leaves [it] with the definite and firm conviction that a mistake has been committed." In re Monetary Group, 2 F. 3d 1098, 1106 (11th Cir. 1993) (quoting to United States v. U.S. Gypsum Co., 333 US 364, 395 (1948)). On appeal, Appellees/Cross-Appellants also bear a heavy burden of demonstrating that the Bankruptcy Court's failure to impose sanctions was an abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 US 384 (1990) (appellate courts should give great deference to the decision of courts on the "front lines" of litigation to impose Rule 11 sanctions in order to free appellate courts from reweighing evidence and reconsidering facts already weighed and considered by the trial court). Id. at 403-05. See e.g. Schwartz v. Millon Air, Inc., 341 F. 3d 1220, 1225 (11th Cir. 2003) (court reviews sanctions under 28 U.S.C. Sec. 1927 for abuse of discretion); and Barnes v. Dalton, 158 F. 3d 1212, 1214 (11th Cir. 1998) (court reviews sanctions under inherent powers for abuse of discretion).

Having reviewed the record and the orders in question, I conclude that the Bankruptcy Court did not err as a matter of law and that it's factual determinations were not clearly erroneous when it denied the Amended Motion for Attorney's Fees and Cross Against Eleanor Cole and Mary Gwynn, as to Mary Alice Gwynn. In reaching this conclusion, I considered the fact that the Bankruptcy Court made a specific and clear factual determination that there was a lack of evidence to prove that Cole's obstructive discovery conduct was Appellant/Cross-Appellee's fault. Specifically, the Bankruptcy Court held that there was no evidence that Cole's behavior was either. Out at Appellant/Cross-Appellee's direction or upon Appellants/Cross-

Appellee's advice. If I were to reverse the Bankruptcy Court on this factual determination or decide otherwise, I would be in properly reconsidering facts already weighed and considered by the Bankruptcy Court judge who had first-hand knowledge of the parties' actions throughout the course of this proceeding. Additionally as a matter of law, I conclude that the Bankruptcy Court did not err when it relied upon Bankruptcy Rule 7037, rather than the inherent power of the court doctrine.

However even if I were to assume that the inherent power of court doctrine could or should have applied, I would reach the same conclusion. A court's inherent power to supervise and sanction parties before it are governed not by rule or statute, but by the inherent control necessarily vested in the courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. Link v. Wabash Railroad Co., 370 US 626 (1961). A federal court has the authority to, and must not avoid responsibility for, monitoring the conduct of all litigants and attorneys who come before it. Tutu Wells Contamination Lit., 161 F.R.D. 46, 62 (D.Vi. 1995) citing Chambers v. NASCO, Inc., 501 US 32, 43 – 46 (1991). The court's obligation is to protect not only litigants who may suffer from abusive litigation practices other adversaries, but also to promote the proper function of a fair and effective judicial system which, while it is adversarial, need not also be callous, uncivil, sneak or boody-trapped. Derzack v. County of Allegheny, Pennsylvania, 173 FRD 400, 411 (W.D. Penn. 1996). When appropriate, the court may use its inherent power to prevent the perpetuation of a "fraud upon the court.' "'Fraud on the court' occurs where it can be demonstrated, clearly and

convincingly, that a party has sentiently set in motion some unconscionable scheme tax related to interfere with the judicial system's ability him partially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corporation, 892 F. 2d 1115, 1118 (1st Cir. 1989). Where misconduct clearly implicates a specific rule, a court should consult and consider it as an avenue of discipline or relief. Martin v. Brown, 63 F. 3d 1252, 1264 (3rd Cir. 1995). However, there may be, under given circumstances, substantial overlap amongst the various rules, and the inherent power of the court overlaps the entire litigation process and "extends to a full range of litigation abuses." Chambers, 501 US at 46. Accordingly, the court's inherent power is broad and can be called upon not only to fill-in the interstices between particular rules of conduct, but also may be referred to in addition to set rules, were appropriate. Id. at 46. Nevertheless, the court's inherent power must always be exercised with caution, id at 43, and the court must take "care in the use of inherent powers to impose sanctions." Martin, 63 F. 3d at 1265.

Due to the scope of the inherent powers vested in federal courts, however, it is necessary that such courts "exercise caution and in invoking [their] inherent power." Chambers, 501 US at 50. Hence, before court can impose sanctions against a lawyer under its inherent power, it must find that the lawyer's conduct "constituted or was tantamount to bad faith." Durrett v. Jenkins Brickyard, Inc., 678 F. 2d 911, 918 (11th Cir. 1982); see also Barnes v. Dalton, 158 F. 3d 1212, 1214 (11th Cir. 1998) ("the key to unlocking a court's inherent power is a finding of bad faith."). "A finding of bad faith

is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purposes of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." Barnes, 158 F. 3d at 1214 (internal quotations omitted).

Thus under the inherent powers doctrine, Appellees/Cross-Appellants bear the burden of producing clear convincing evidence that Appellant/Cross-Appellee engaged in a "fraud on the court" or actions constituted bad faith or respect to Cole's actions. However, the Bankruptcy Court specifically concluded that "there was no evidence presented that Cole's obstructive discovery conduct was Gwynn's fault, having either been carried out at Gwynn's directions, or upon Gwynn's advice. Absent evidence of Gwynn's culpability in advising Cole not to appear and testify at her deposition, or to otherwise not participate in discovery, there exist no basis pursuant to Bankruptcy Court 7037, or pursuant to any other authority to assess sanctions against Gwynn." Without clear and convincing evidence or any evidence of "fraud on the court" or other behavior working sanctions presented by Appellee/Cross-Appellants, the Bankruptcy Court would have not been able to exercise its inherent power to impose sanctions against Appellant/Cross-Appellee. Furthermore, the Bankruptcy Court's decision not to impose sanctions against Appellant/Cross-Appellee for Cole's action was not in error and with it in its discretion. Specifically, the Bankruptcy Court as the fact-finder had discretion to impose sanctions against Cole and not Appellant/Cross-Appellee given the facts in the record and its specific

factual findings. Thus, I conclude that the Bankruptcy Court did not err with regard to any of the Orders on cross-appeal and therefore I AFFIRM the Orders on Appellees/Cross-Appellants' cross-appeal.

V. Conclusion

For the following reasons:

It is hereby ORDERED AND ADJUDGED:

1) Appellant's "Motion to Supplement the Designation of Record on Appeal to Include Record Items from Dismissed Appeals Case No.: 06-80731 CIV-GOLD/TORRES, and Case No.: 06-80804 CIV-GOLD/TORRES" [DE # 15] is GRANTED.

2) Appellees/Cross Appellants' "Response to Appellant, Mary Alice Gwynn's Motion to Extend Allowed Pages of Initial Brief, Pursuant to Local Rule 87.4(E)(2) [D.E. 14]; Motion to Strike Appellant's Initial 34 Intentional Misrepresentations to the Court; and Motion for Sanctions Pursuant to this Court's Order Placing Parties on Notice That Court May Invoke Federal Rule of Civil Procedure 11 [D.E. 12] [DE # 23] is DENIED in its entirety. To the extend that Appellees' Motion seeks to oppose Appellant's Motion to Extend Allowed Pages of Initial Brief, this portion of the Appellees' Motion is DENIED as moot. To the extent that Appellees seek to strike Appellant's Initial Brief in part or Cole, such request is DENIED. To the extent that Appellees seek the Court to impose sanctions on Appellant for her alleged "misrepresentations" contained in her Initial Brief and in her Motion for Page Extension as well as for general

conduct during the course of this appeal, such request is DENIED.

3) I AFFIRM all of the Bankruptcy Court's Orders on appeal and cross-appeal.

4) this case is CLOSE.

DONE AND ORDERED in Chambers at Miami, Florida, this 14 day of March 2007.

Footnote

[1]Because Appellant conceded that all other Orders previously appealed were non-final Orders, I can use my discretion not to review these Orders.

No.

IN THE

Supreme Court of the United States

MARY ALICE GWYNN, PETITIONER

v.

JAMES F. WALKER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SECOND SUPPLEMENTAL APPENDIX

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Filed 7/26/07

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-80121-CIV-GOLDITURNOFF

MARY ALICE GWYNNE, ESQUIRE, Appellant,
v.
JAMES F. WALKER, Appellee.

OMNIBUS ORDER, AFFIRMING ALL BANKRUPTCY ORDERS ON APPEAL, AND CLOSING CASE

This is an appeal from the following Order entered by the Bankruptcy Court for the Southern District of Florida on December 11, 2006 entitled "Order: 1) Granting In Part and Denying In Part Mary Alice Gwynn, Esquire's Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c)(1)(A), Pursuant to Bankruptcy Local Rule 8014-1(F)(1)(sic) [C. P. 1462]; and 2) Granting in Part and Denying In Part Debtor and Rotella's Emergency Motion to Strike and/or Dismiss Gwynn's Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as Prevailing Party Under Rule 9011 (c)(1)(A), Pursuant to Bankruptcy Local Rule 8014-1(F)(1) [C.P.1848]." For the reasons discussed below, I affirm all of the rulings of the Bankruptcy Court on appeal.

I. Background

These facts are gleaned from the record, the parties' submissions and the decision of the Bankruptcy Court in In re Walker, 2006 WL 3922113 (Bkrtcy, S.D. Fla.

2006). Debtor James F. Walker filed a petition for Chapter l bankruptcy relief on April 25, 2003. Attorney Gary J. Rotella ("Rotella") represented Debtor in the bankruptcy proceedings. Appellant Mary Alice Gwynn ("Appellant") represented Eleanor C. Cole and Florida Precision Calipers, Inc. in the bankruptcy proceedings. Ms. Cole and Florida Precision Calipers, Inc. were the two largest creditors in the bankruptcy. Appellant alleged that sometime after Debtor filed bankruptcy, Debtor's wife, Carol Ann Walker, transferred her interest in a piece of real property located in the Bahamas to Attorney Rotella.

On April 21, 2004, Appellant filed an "Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P.A. From Representing the Debtor." [Bankruptcy DE # 292]. Also on April 21, 2004, Attorney Rotella sent a Rule 9011 communication to Appellant indicating that he would seek Rule 9011 sanctions in connection with the Motion to Disqualify if it were not withdrawn. On April 26, 2004, Appellant filed Cole's Supplemental Memorandum of Law in Support of the Motion to Disqualify. Also on April 26, 2004, Attorney Rotella filed a "Motion to Shorten 21 Day Notice Period For Filing Motion for Sanctions Pursuant to Bankruptcy Rule 9011." [Bankruptcy DE # 321]. On April 28, 2404, the Bankruptcy Court heard oral argument and denied the Motion to Disqualify. The Bankruptcy Court found that as creditor, Cole lacked standing to assert on behalf of the Debtor's family, that Attorney Rotella had a potentially disqualifying interest. The Bankruptcy Court also heard and denied the Motion to Shorten on April 28, 2004.

On May 18, 2004, Appellant filed a "Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P.A." Also on May 18, 2004, the Rule 9011 Movants filed the Motion for Sanctions which sought attorneys' fees and costs incurred in connection with the Motion to Disqualify. At the hearing held on May 28, 2004, the Bankruptcy Court orally denied the Renewed Motion to Disqualify and the Bankruptcy Court found that the Renewed Motion to Disqualify was based on the same legal theory, which it previously found to be without merit. The Bankruptcy Court also orally granted the Motion for Sanctions against Appellant which had been based upon the original Motion to Disqualify that the Bankruptcy Court denied on April 28, 2004. The Bankruptcy Court's ruling awarding Appellee sanctions was memorialized in the Court's June 15, 2004, "Order Granting Motion for Sanctions Pursuant to Rule 9011." [Bankruptcy DE # 437]

A hearing was held on April 21, 2005 to liquidate the amount of sanctions awarded by the June 15, 2004 Order. On May 11, 2005, the Bankruptcy Court entered a "Final Judgment and an Order Awarding Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011." [Bankruptcy DE# 881] The Bankruptcy Court imposed sanctions against Appellant in the amount of $80,572.50. Thereafter, Appellant filed a Notice of Appeal of that Order on May 20, 2005. [Bankruptcy DE # 911].

On March 20, 2006, I entered an Order Vacating Final Judgment of Bankruptcy Court in the appeal styled Mary Alice Gwynn v. James F. Walker, Lead Case No. 05-80714-CIVGOLD/TURNOFF consolidated with

Case No. 05-80715-CIV-GOLD/TURNOFF. In that Order, I determined, among other things, that the Bankruptcy Court's imposition of Rule 9011 sanctions was inappropriate because the underlying Motion to Disqualify had been denied by the Bankruptcy Court prior to the Rule 9011 Movants filing their Motions for Sanctions. After I entered my March 20, 2006 Order, Appellant filed her "Motion for Bankruptcy and Appellate Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c)(1)(A) Pursuant to Bankruptcy Local Rule 80141 (F)(1)(sic)" along with a Summary of Fees and Costs in the Bankruptcy Court. [Bankruptcy DE # 1462 and 1465]. On October 23, 2006, Appellant filed an Amended Summary of Fees and Costs. [Bankruptcy DE # 1795]. On October 25, 2006, the Bankruptcy Court conducted a telephonic hearing on the Appellee's "Debtor and Gary Rotella's Emergency Motion to Strike and/or Dismiss Gwynn's Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party under Rule 9011 (c)(1)(A) Pursuant to Bankruptcy Local Rule 8014-1(F)(1)," [Bankruptcy DE # 1857] during which the Bankruptcy Court denied the Appellant's Motion for any fees concerning the appeal.

On November 2, 2006, Appellant filed an "Updated and Revised Summary of Fees and Costs." On November 6, 2006, the Bankruptcy Court conducted an evidentiary hearing on the Appellant's "Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c)(1)(A) and Pursuant to Bankruptcy Local Rule 8014-1(F)(1)." On December 11, 2006, the Bankruptcy Court issued its "Order Denying Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing

Party Under Rule 9011 (c)(1)(A) and Pursuant to Bankruptcy Local Rule 8014-1 (F)(1)," which is the subject of this appeal. In that Order, Bankruptcy Court concluded that Appellant was not a "prevailing party" because she did not prevail in the Bankruptcy Court either in prosecuting the underlying Motion to Disqualify or in opposing the Motion for Sanctions. Additionally, the Bankruptcy Court held that it did not have jurisdiction under Rule 9011 to award attorney's fees incurred on appeal. Moreover, the Bankruptcy Court held "[e]ven if an award of attorney's fees and costs to [Appellant] were appropriate, the Court would not exercise its discretion to make such an award given [Appellant's] unprofessional conduct in this case." Lastly, the Bankruptcy Court found that Appellant was entitled to $1,591.58 in costs pursuant to Bankruptcy Rule 8014.[1]

On December 19, 2006, Appellant filed her Notice of Appeal of the Court's "Order Denying Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011(c)(1)(A) and Pursuant to Bankruptcy Local Rule 8014-1(F)(1)." The appeal of this Order was fully briefed by the parties and is now ripe for review.

II. Standard of Review

In essence, Appellant takes issue with both the Bankruptcy Court's rulings with regard to Rule 9011 sanctions and the amount of costs awarded under Local Rule 8014-1 (F)(1). "When reviewing the imposition of sanctions, the primary question before us is whether the sanctioning court abused its discretion." In re: Mroz, 65 F. 3d 1567, 1571 (11th Cir.1995); see also Kaplan v.

DaimlerChrysler, 331 F.3d 1251, 1255 (111 th Cir. 2003); In re Suncoast Airlines, 188 B. R. 56, 58 (S.D. Fla. 1994). An abuse of discretion occurs where a court "misapplies the law in reaching its decision or bases its decision on findings of fact that are clearly erroneous." Arce v. Garcia, 434 F.3d 1254, 1260 (11 th Cir. 2006). The award of sanctions appealed in this case was awarded under Bankruptcy Rule of Procedure 9011. "Bankruptcy Rule 9411 is substantially identical to Federal Rule of Civil Procedure 11." Id. at 1572. Where a court enters an award of sanctions as a penalty for the filing of a frivolous pleading, the court should "only focus on the merits of the pleading gleaned from the facts and law known or available to the attorney at the time of filing." Id. (citing Jones v. Intern'l Riding Helmets, Ltd., 49 F.3d at 694-95).

In a bankruptcy appeal, the district court functions as an appellate court in reviewing the bankruptcy court's decision. See In re Sublett, 895 F. 2d 1381,1383-84 (11th Cir.1990) (citing 28 U.S.C. §158(a), (c)}. In this capacity, district courts must give considerable deference to a bankruptcy court's findings of fact, and will not overturn its factual findings unless it determines that those findings are clearly erroneous. See In re Chase & Sanborn Corp., 904 F. 2d 588, 593 (11th Cir. 1990); In re Pepenella, 103 B. R. 229, 300 (M. D. Fla. 1988). Conclusions of law made by bankruptcy courts are reviewed de nova. See Sublett, 895 F.2d at 1383.

III. Legal Analysis

Appellant argues that the Bankruptcy Court erred in three significant ways. Specifically, Appellant argues that: 1) the Bankruptcy Court erred as a matter of law

in deciding that Appellant was not the prevailing party under Rule 9011(c)(1)(A); 2) that the Bankruptcy Court erred as a matter of law in its finding that the Court did not have jurisdiction to award appellate fees pursuant to Rule 9011; and 3) that the Bankruptcy Court erred as a matter of law in finding that pursuant to Bankruptcy Rule 8014 that the Appellant was entitled to tax costs but not to reasonable expenses. In Response, Appellee argues that Appellant was not the prevailing party relative to the Rule 9011 Motion; that the sanctions awarded pursuant to Bankruptcy Rule 9011 are completely discretionary; that the Bankruptcy Court properly found that it lacked jurisdiction to award Appellant appellate fees and expenses related to the Rule 9011 Motion; and that Appellant is not entitled to all costs and expenses listed in her summary. I agree with the Appellee on all of these points.

With regard to Appellant's first argument, I conclude that Appellant's argument that she is a "prevailing party" under Rule 9011 to be without merit. Appellant's argument is based on a faulty premise. Rule 11 is not a fee-shifting statute and, as such, the term "prevailing party" has no relevance to Rule 11 and/or Rule 9011. With regard to Appellant's second argument, I conclude that Appellant's argument that Rule 9011 mandated the award of sanctions against Appellee based on this Court's prior reversal of the Bankruptcy Court's imposition of Rule 9011 sanctions against her to be also without merit because it is well-established that the imposition of both Rule 9011 and Rule 11 sanctions are awarded on a discretionary, not mandatory, basis.

The United States Supreme Court in Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,

498 U.S. 533, 552-553 (1991) addressed these two issues and stated in relevant part:

> Petitioner's challenges do not clear these substantial hurdles. In arguing that the monetary sanctions in this case constitute impermissible fee shifting, Business Guides relies on the Court's statement in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616-17, 44 L.Ed.2d 141 (1975), that, in the absence of legislative guidance, courts do not have the power "to reallocate the burdens of litigation" by awarding costs to the losing party in a civil rights suit; they have only the power to sanction a party for bad faith. See id., at 258-259, 95 S.Ct., at 1622-1623. The initial difficulty with this argument is that Alyeska dealt with the courts' inherent powers, not the Rules Enabling Act. Rule 11 sanctions do not constitute the kind of fee shifting at issue in Alyeska. Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful at least well founded. Nor do sanctions shift the entire cost of litigation: they shift only the cost of a discrete event. Finally, the Rule calls only for "an appropriate sanction"-attorney's fees are not mandated. As we explained in Cooler & Gell: " Rule 11 is not a fee-shifting statute .... `A movant under Rule 11 has no entitlement to fees or an other sanction.' " 496 U.S., at 409, 110 S.Ct., at 2462. (emphasis added and internal citation omitted).

Thus, Appellant's argument that she is entitled to her attorneys' fees as the purported "prevailing party" on an appeal ignores the fact that sanctions pursuant to Rule 9011 are discretionary, even if the term "prevailing party" was applicable to Rule 9011. The plain language of Rule 9011 states in relevant part: "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Accordingly, even if the Appellant was in fact the "prevailing party" relative to the Rule 9011 Motion in the Bankruptcy Court (which she was not), the Bankruptcy Court had discretion not to award her attorney's fees and expenses because Rule 9011 is not a "fee-shifting" rule or statute. In fact in its December 11, 2006 Order, the Bankruptcy Court determined that it would not exercise its discretion to award Appellant any attorneys' fees and/or costs pursuant to Rule 9011 given Appellant's prior conduct.

In relevant part, the Bankruptcy Judge stated:

> In this case, the Motion for Sanctions was triggered by [Appellant's] frivolous pleading. [Appellant's] filing of Cole's Motion to Disqualify was unwarranted under existing law because Cole lacked standing to assert a conflict of interest on behalf of members of Debtor's family... Even if an award of attorney's fees and costs to [Appellant] were appropriate, the Court would not exercise its discretion to make such an award given [Appellant's] unprofessional conduct in this case.

Given the clear case law on Rule 11 and Rule 9011, I conclude that the Bankruptcy Court did not err as a matter of law when it determining that Appellant was not the "prevailing party." Nor did the Bankruptcy Court abuse its discretion when it concluded that Appellant was not entitled on a discretionary basis to any attorney's fees and expenses pursuant to Rule 9011.[2]

While Bankruptcy Rule 9011 does not provide for appellate attorney's fees, Bankruptcy Rule 8014 does provide for taxation of certain appellate costs. Rule 8014 states in pertinent part:

> Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

Bankruptcy Rule 8014 does not refer to the taxation of costs in favor of the prevailing party. However, Rule 8014 states that, as a general rule, costs "shall be taxed against the losing party on an appeal."

With regard to Rule 8014, Appellant argues that "[s]ince the Bankruptcy Court denied the Appellant's Motion for reasonable fees and reasonable costs under Rule 9011(c)(1)(A) as the prevailing party, the Court awarded taxable costs under the limited scope of Rule 8014."

(Appellant's Initial Brief, 24), Consequently, Appellant argues that the Bankruptcy Court should have awarded her reasonable expenses as well as costs that were incurred as a result of opposing the Rule 9011 sanctions motion and the resulting appeal in this Court. Appellee does not raise any challenge to the Bankruptcy Court's taxation of costs.

In this case, the Bankruptcy Court stated in relevant part:

> Gwynn's Third Summary of fees and costs seeks taxation of $5,961.44 in appellate costs. The Court finds it appropriate to tax only the appellate costs listed in Rule 8014 and Part IX "Appellate Costs" of the Court's Guideline for Taxation of Costs by the Clerk "Guidelines") that were necessary for the prosecution of [Appellant's] appeal.

In rendering its decision in taxing costs and expenses, the Bankruptcy Court examined each of Appellant's alleged costs and expenses in turn and concluded that Appellant was only entitled to $1,591.59 out of the $5,961.44 costs and expenses demanded. In taxing costs, the Bankruptcy Court based its decision upon its close review of Bankruptcy Rule 8014 and Part IX "Appellate Costs" of the Court's Guideline for Taxation of Costs by the Court. Specifically in its Order, the Bankruptcy Court addressed each of Appellant's itemized alleged expenses line-by-line in pages 13-16 of its Order and I am satisfied that it provided sufficient justification for his decision to exclude certain expenses and to grant other costs. Thus, I conclude that the Bankruptcy Court's decision to tax appellate costs in

the amount of $1,591.58 against Rotella, Rotella P.A., and the Debtor, jointly and severally, pursuant to Rule 8414 was not clearly erroneous or without basis in law.[3]

IV. Conclusion

For the reasons stated above,

It is hereby ORDERED AND ADJUDGED that:

1) I AFFIRM all portions of the Bankruptcy Court's Orders on appeal. Thus, Appellant's request to remand this matter back to Bankruptcy Court for an evidentiary hearing is DENIED.

2) I DENY Appellee's counsel attorneys' fees and costs pursuantto Bankruptcy Rule 8020.[4] With regard to Appellee's argument that I sanction Appellant for alleged misrepresentations of both fact and law, I decline to exercise m discretion to impose an such sanctions for an alleged conduct.

3) The Clerk of Court is directed to CLOSE this matter.

DONE AND ORDERED in Chambers at Miami, Florida, this 25 day of July 2007.

Footnotes

[1]In its conclusion, the Bankruptcy Judge stated:

> The Court does not find it warranted pursuant to Rule 9011(c)(1)(A) to award attorney's fees and costs to [Appellant] for opposing the Motion for

> Sanction in this Court. In addition, Rule 9011(c)(1)(A) does not provide authority for this Court to consider a request for appellate attorney's fees incurred before the District Court. The Court does, however, find it appropriate to tax appellate costs in the amount of $1,591.58 against Rotella, Rotella P.A., and the Debtor, jointly and severally, pursuant to Rule 8014.

[2]Appellant's argument that the Bankruptcy Court erred in finding that it did not have jurisdiction to award appellate fees is also without merit. Also, the Bankruptcy Court's reliance on In re. George Schumann Tire & Battery Co., 106 B. R. 296 (Bankr. M. D. Fla. 1986) was well-placed. In In re: George Schumann Tire & Battery Co., a bankruptcy court held that Bankruptcy Rule 9011 governs only the initial proceeding in a bankruptcy court and not appeals pending in the district court.

In relevant part, the court in In re: George Schumann Tire & Battery Co. noted:

> This Court is not oblivious of the case of In re Jacobson, 47 B.R. 476 (D.C.1985) decided by the bankruptcy court for the District of Colorado where the bankruptcy court used Fed. R.Civ.P.11 as a basis for imposition of sanctions in connection with an appeal. It appears clearly from the decision, however, that the bankruptcy court failed to make a distinction between Fed.R.Civ.P.11 and Bankruptcy Rule 9011 and since the Motion to impose sanctions was sought

under both Rules, the imposition of sanctions might have been proper.

In re: George Schumann Tire & Battery Co., 106 B. R. at 298.

In this case, Appellant's Motion requested attorney's fees only under Bankruptcy Rule 9011, not Rule 11. Thus, I conclude that the Bankruptcy Court did not err when it concluded that Bankruptcy Rule 9011 does not authorize awarding appellate attorney's fees incurred in proceeding before the District Court.

[3] In its Response Brief, Appellee argues Appellant blatantly misrepresented the record in footnote 1 of her Initial Brief. In relevant part, Appellee argues "[Appellant] intentionally attempts to suggest that undersigned engaged in misconduct and deceit in the Bankruptcy Court." Similar, personal attacks were present in Appellant's briefs. While I refrain from awarding sanctions against either party in this case, I note that both parties' behavior in this appeal, as well as the numerous other appeals I have had before me over past two Years has been less than professional and bordered on sanctionable behavior.

[4] Bankruptcy Rule 8020 provides, "if a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may ... award just damages and single or double costs to the appellee." The language of Bankruptcy Rule 8020 , in relevant part, is identical to that of Federal Rule of Appellate Procedure 38 ("Appellate Rule 38"), and therefore, a court considering a Bankruptcy Rule 8020 motion should be guided by

cases applying Appellate Rule 38. The purpose for sanctions under Appellate Rule 38 is to "compensate appellees who are forced to defend judgments awarded them in the trial court from appeals that are wholly without merit." Nagle v. Alspach, 8 F.3d 141,145 (3rd Cir.1993). The analysis is purely objective, limited to a focus on the merits of the appeal and "regardless of [the appellant's] good or bad faith." Id. (quotation omitted). However, a court must exercise caution in awarding damages under Appellate Rule 38 because imprudent awards may "chill" parties' desire to appeal difficult and novel questions. Hillman Co. (V.I.) Inc. v. Hyatt Intern., 899 F.2d 250, 253 (3rd Cir.1990). Therefore, a court should not award damages unless the appeal "lacks colorable support." Nagle, 8 F.3d at 145. In light of this standard, I conclude that Appellant has presented arguments that are not entirely without "colorable support." Thus, I conclude that Appellant's arguments are minimally sufficient to warrant the denial of Appellee's motion for damages and costs for this appeal.

Filed 12/12/2006
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division
CASE NO: 03-32158-BKC-PGH Chapter 7 Proceedings

IN RE JAMES F. WALKER, Debtor.

ORDER: 1) GRANTING IN PART AND DENYING IN PART MARY ALICE GWYNN, ESQUIRE'S MOTION FOR BANKRUPTCY AND APPELLATE COURT ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY UNDER RULE 9011 (c) (1) (A), PURSUANT TO BANKRUPTCY LOCAL RULE 8 014 -1(F) (1) (sic) [C. P. 1462] ; AND 2)GRANTING IN PARY AND DENYING IN PART DEBTOR AND ROTELLA'S EMERGENCY MOTION TO STRIKE AND/ OR DISMISS GWYNN'S MOTION FOR BANKRUPTCY AND APPELLATE COURT ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY UNDER RULE 9011 (c) (1) (A) , PURSUANT TO BANKRUPTCY LOCAL RULE 8014-1(F) (1) [C. P.1790]

THIS MATTER came before the Court for hearing on October 25, 2006 and on November 2, 2006 upon Mary Alice Gwynn, Esquire's ("Gwynn") Motion for Bankruptcy and Appellate Court Attorney's Fees and Costs as the Prevailing Party Under Rule 9011 (c) (1) (A) , Pursuant to Bankruptcy Local Rule 8014-1 (F) (1) (sic) [C. P.1462] ("Motion") and upon James F. Walker' s ("Debtor") and Gary J. Rotella, Esquire's ("Rotella") Emergency Motion to Strike and/or Dismiss [Gwynn's Motion] [C. P. 1790] ("Motion to Dismiss"').

On April 18, 2006, Gwynn filed both her Motion and a Summary of Fees and Costs [C. P. 1465] ("First Summary") . The Motion argues that as the prevailing party under Bankruptcy Rule 9011(c) (1) (A) , Gwynn is entitled to attorney's fees and costs incurred in this Court, as well as attorney's fees and costs incurred in District Court for her appeal of this Court's award of sanctions pursuant to Debtor, Rotella, and Gary J. Rotella & Associates, P.A.'s ("Rotella P.A.") (collectively the "Rule 9011 Movants") Motion for Sanctions Against Mary Alice Gwynn, Esquire and Creditor Eleanor C. Cole Pursuant to Bankruptcy Rule 9011 [C. P.360] ("Motion for Sanctions") . Gwynn's First Summary sought $99,721.98 in total fees and costs for both the proceedings in this Court and for her appeal to the District Court. Pursuant to the Court's Order Specially Resetting Hearing [C.P.1757], on October 23, 2006 Gwynn filed an Amended Summary of Fees and Costs ("Second Summary") [C . P .17 95] in which the total fees and costs sought by Gwynn for the proceedings in this Court and in the District Court had increased to $104,981.84. On November 2, 2006, Gwynn filed an Updated and Revised Summary of Fees and Costs Pursuant to the Court's Ruling On October 25, 2006 ("Third Summary") [C. P .1822] . Pursuant to the Court' s oral ruling of October 25, 2006 which is discussed below, Gwynn's Third Summary deleted appellate attorney's fees from the amount sought. Thus, Gwynn' s Third Summary sought $35, 500. 00 in paralegal and attorney' s fees incurred in this Court, and $5,961.44 for appellate costs.

BACKGROUND

The Debtor filed for protection under Chapter 7 of the Bankruptcy Code on April 25, 2003. Eleanor C. Cole ("Cole") filed a claim against the Debtor's bankruptcy estate based upon a final judgment she received against the Debtor in State Court. The Court's docket reflects that Gwynn represented Cole in this case from July 17, 2003 until June 9, 2004. On April 21, 2004 Gwynn filed Cole's Emergency Motion to Disqualify the Law Firm of Gary J. Rotella & Associates, P. A. From Representing the Debtor [C . P . 2 92] ("Motion to Disqualify"). Also on April 21, 2004, Rotella sent a Rule 9011 communication to Gwynn indicating that he would seek sanctions in connection with the Motion to Disqualify if it were not withdrawn. On April 26, 2004, Gwynn filed Cole's Supplemental Memorandum of Law in Support of [the Motion to Disqualify] [C. P. 311] ("Supplemental Memorandum"). Also on April 26, 2004, Rotella filed the Rule 9011 Movants' Motion to Shorten 21 Day Notice Period For Filing Motion for Sanctions Pursuant to Bankruptcy Rule 9011 [C. P. 321] ("Motion to Shorten"). On April 27, 2004, the Rule 9011 Movants filed a Response to [Motion to Disqualify] [C. P.318] ("First Response"). Also on April 27, 2004, the Rule 9011 Movants filed a Response to [the Supplemental Memorandum] [C.P. 317] ("Second Response"). On April 28, 2004, the Court heard oral argument and denied the Motion to Disqualify. Among other things, the Court found that as a creditor, Cole lacked standing to assert on behalf of members of Debtor's family, that Rotella had a potentially disqualifying conflict of interest. The Court also heard and denied the Motion to Shorten on April 28, 2004.

On May 18, 2004, Gwynn filed a Renewed Motion to Disqualify the Law Firm of Gary J. Rotella & Assocates

P.A. ("Renewed Motion to Disqualify") [C. P. 361] Also on May 18, 2004, the Rule 9011 Movants filed the Motion for Sanctions which sought attorneys' fees and costs incurred in connection with the Motion to Disqualify. At a hearing held May 28, 2004, the Court orally denied the Renewed Motion to Disqualify. The Court found that the Renewed Motion to Disqualify was based upon the same grounds contained in the original Motion to Disqualify which the Court had already denied for lack of standing. The added grounds in the Renewed Motion to Disqualify, having been based on a dismissed adversary proceeding, were determined to be moot. The Court then orally granted the Motion for Sanctions against Gwynn which had been based upon the original Motion to Disqualify that the Court denied on April 28, 2004. The Court's ruling was memorialized in the Court's June 15, 2004, Order Granting Motion for Sanctions Pursuant to Bankruptcy Rule 9011 [C.P. 437] ("June 15, 2004 Order") .

Ten months later, on April 6, 2005, Gwynn filed a Motion to Amend, Correct or withdraw the Court's Order Granting Debtor's Motion for Sanctions Pursuant to Rule 9011 Dated June 15, 2004 and Rule 60 Federal Rules of Civil Procedure [C. P. 793] ("Rule 60(b) Motion") Which the Court denied on April 8, 2005. See Order Denying Gwynn's Motion to Amend, Correct or withdraw the Court's Order Granting Debtor's Motion for Sanctions Pursuant to Rule 9011 Dated June 15, 2004 and Rule 60 Federal Rules of Civil Procedure [C . P . 799] ("Order Denying Rule 60(b) Motion""). Also on April 6, 2005 Gwynn filed a Motion to Strike or Dismiss Debtor's [Motion for Sanctions] for Failure to Abide by Rule 11 [C.P. 792] ("Motion to Dismiss"). On April 8, 2005 the Court entered an Order Denying Gwynn's

[Motion to Dismiss] [C.P. 801]. On April 18, 2005, Gwynn filed Notice of Appeal No. 818 [C. P. 818] wherein she appealed both the Order Denying Rule 60(b) Motion and the Order Denying Gwynn's Motion to Dismiss. A hearing was held on April 21, 2005 to liquidate the amount of sanctions awarded by the June 15, 2004 Order. On May 11,2005, the Court entered a Final Judgment [C. P. 876] and an Order Awarding Sanctions Against Mary Alice Gwynn, Esquire Pursuant to Bankruptcy Rule 9011 [C. P. 8811 (collectively with the June 15, 2004 Order, the "Orders Awarding Rule 9011 Sanctions") which imposed sanctions against Gwynn in the amount of $80,572.50. Gwynn filed Notice of Appeal No. 911 [C.P.911] on May 20, 2005 appealing the Orders Awarding Rule 9011 Sanctions.[1]

On March 20, 2006, the Honorable Alan S. Gold, United States District Court Judge, entered an Order Vacating Final Judgment of Bankruptcy Court (the "District Court Order") in the appeal styled Mary Alice Gwynn v. James F. Walker (In re James F. Walker), in the United States District Court for the Southern District of Florida, Lead Case No.05-80714-Civ-Gold/Turnoff consolidated with Case No. 05-80715-Civ-Gold/Turnoff. The District Court Order determined that imposition of Rule 9011 sanctions was inappropriate because the underlying Motion to Disqualify had been denied by this Court prior to the Rule 9011 Movants filing their Motion for Sanctions. See District Court Order [C. P. 1415].

Gwynn subsequently filed the instant Motion seeking prevailing party fees and costs pursuant to Bankruptcy Rules 9011 and 8014.

CONCLUSIONS OF LAW

A. Bankruptcy Court Fees and Costs

Bankruptcy Rule 9011(c) (1) (A) states in pertinent part

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) . It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

Bankruptcy Rule 9011(c) (1) (A) (emphasis added).

Gwynn' s Motion argues that she is the prevailing party and as such is entitled to an award of attorney's fees and costs incurred in opposing the Motion for Sanctions. The Court notes at the outset that Gwynn did not prevail in this Court either in prosecuting the underlying Motion to Disqualify or in opposing the Motion for Sanctions. The two cases cited by Gwynn in support of her argument are readily distinguished from the facts of this matter. In Gulf Coast Orthopedic

Center, 297 B.R. 861 (Bankr. M. D. Fla. 2003) the Rule 9011 motion against counsel was found to be without merit. However significantly and unlike this case, said counsel also prevailed on the underlying substantive motion. Id. at 865. In Kirk-Murphy Holding, Inc., 313 B.R. 918 (Bankr. N.D. Fla. 2004) the Court awarded fees pursuant to Rule 9011 (c) (1) (A) because of the subject Rule 9011 motion's procedural defects. The Kirk-Murphy court found that "[t]he alleged debtor's warning letter did not serve as a substitute for a motion, service of the motion is the requirement imposed by Bankruptcy Rule 9011." Id. at 923. Unlike Kirk-Murphy, in this case the Motion for Sanctions was served on Gwynn twenty-one days prior to its being filed with the Court. Indeed, Rotella filed Debtor's Motion to Shorten (the twenty-one day notice period under Rule 9011) which the Court denied. Althcugh the motion for reconsideration upon which the Kirk-Murphy Rule 9011 motion had been based was denied, the opinion offers no hint of whether the underlying motion for reconsideration was frivolous or unwarranted.

In this case, the Motion for Sanctions was triggered by Gwynn's frivolous pleading. Gwynn"s filing of Cole's Motion to Disqualify was unwarranted under existing law because Cole lacked standing to assert a conflict of interest on behalf of members of Debtor's family. Nevertheless after the Motion to Disqualify was denied, Gwynn filed a Renewed Motion to Disqualify which restated the same grounds and some additional grounds that were moot. The Debtor and Rotella were compelled to file two Responses and Rotella was compelled to appear in this Court to defend both the Motion to Disqualify and the Renewed Motion to

Disqualify. In prosecuting the Motion to Disqualify and the Renewed Motion to Disqualify, Gwynn endeavored to prove, albeit unsuccessfully, that the motions were warranted and not frivolous. Gwynn's efforts prosecuting the Motion to Disqualify and the Renewed Motion to Disqualify were in essence the same effort required for her defense of the Motion for Sanctions. The Rule 9011 Movants on the other hand incurred unnecessary costs because they were compelled to respond to Gwynn' s frivolous pleadings. The Court is mindful that 'the central purpose of Rule [9011] is to deter baseless filings. . . any interpretation must give effect to the Rule's central goal of deterrence."[2] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 S. Ct. 2447, 2454 (1990). Gwynn filed the baseless Motion to Disqualify and Renewed Motion to Disqualify in this case, the other side was compelled to respond and to make an appearance before the Court. An award of attorney's fees in favor of Gwynn would reward, not deter, Gwynn' s baseless filings. Thus the Court finds that an award of attorney's fees and costs to Gwynn pursuant to Rule 9011 (c) (1) (A) is unwarranted.[3]

Even if an award of attorney's fees and costs to Gwynn were appropriate, the Court would not exercise its discretion to make such an award given Gwynn's unprofessional conduct in this case.[4] See e.g., Memorandum Order [C.P.1472]; Order: 1) Denying Mary Alice's Gwynn's Motion for Rehearing and Reconsideration of the Court's Sua Sponte Order Directing Mary Alice Gwynn, Esq. , to Stop Filing Notices of Filing; 2) Imposing Sanctions; and 3) Striking Court Paper Nos. 1529 and 1530 [C. P. 1550] ; Order Denying Requested Relief in Mary Alice Gwynn 's Response to Debtor's Emergency Motion for

Extension, Continuance and Modification of Ruling Dated May 26,2006 [C. P. 1576] ; Order: 1) Denying Mary Alice's Gwynn's Motion for Rehearing and Reconsideration of this Court's "Order Denying... Requested Relief in Mary Alice Gwynn's Amended Reply" (D.E. # 1602) Dated June 27, 2006 [C. P. 1633]; 2) Denying Relief Requested in Mary Alice Gwynn's Supplement to Her Motion for Rehearing. [C.P. 1642]; and 3) Denying Mary Alice Gwynn's Motion for Evidentiary (Sic) on All the Issues Raised ... [C. P.1641] [C. P.1644] ; and Order on Order to Show Cause [C. P.1553] .

B. District Court Appellate Fees and Costs

1. Bankruptcy Rule 9011 Does Not Provide for Attorney's Fees Incurred on Appeal

On October 25, 2006, the Court heard Debtor and Rotella's Motion to Dismiss. Rotella argued that based upon the Order on Order to Show Cause having prohibited Gwynn from representing any parties before this Court until she completed the required qualifications to practice, Gwynn's prosecution of her Motion was tantamount to her unlicensed practice of law. See Order on Order to Show Cause [C.P.1553]. The Court denied this portion of the Motion to Dismiss because the Court's prohibition was limited to Gwynn representing other parties, she was not prohibited from representing her own interests in this Court. The Motion to Dismiss also argued that Gwynn had presented no legal authority that would allow this Court to award attorney's fees incurred in connection with an appeal to District Court. The Court construed this portion of Debtor and Rotella's Motion to Dismiss

as a motion in limine concerning evidence on appellate fees, and the Court agreed that the Bankruptcy Court is not the proper forum to consider Gwynn's request for an award of appellate attorney's fees pursuant to Rule 9011. "Bankruptcy Rule 9011 governs only the initial proceeding in a bankruptcy court and not appeals pending in the district court." In re George Schumann Tire & Battery Co., 106 B.R. 296, 298 (Bankr. M.D. Fla. 1989). As the Supreme Court explained, "Rule [9011] is not a fee-shifting statute, the policies for allowing district courts to require the losing party to pay appellate, as well as district court attorney's fees, are not applicable."' Cooter & Gell v. Hartmarx Corp., 496 U.S. at 408. "On its face, Rule [9011] does not apply to appellate proceedings. . Rule [9011] is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level." Id. at 406. Thus, Bankruptcy Rule 9011 does not authorize this Court to award appellate attorney's fees incurred in proceedings before the District Court.

Gwynn opposed the Motion for Sanctions in this Court, she appealed this Court's Orders before the District Court. Appeals to the District Court in bankruptcy cases are governed by Part VIII of the Bankruptcy Rules. Part VIII of the Rules does not contain any version of Bankruptcy Rule 9011. George Schumann, 106 B.R. at 299. Therefore, the Court denies Gwynn's request for an award of appellate attorney's fee without prejudice to her seeking such relief in the proper tribunal.

2. Bankruptcy Rule 8 014

While Bankruptcy Rule 9011 does not provide for appellate attorney's fees, Rule 8014 does provide for taxation of certain appellate costs. Rule 8014 states in pertinent part:

> Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

B.R. 8014.

In this matter, the District Court vacated this Court's Orders Awarding Rule 9011 Sanctions. Therefore pursuant to Rule 8014, taxation of costs is allowed only as ordered by the Court. Rotella's Written Opening Statement for November 2, 2006 Hearing [C. P.1820] ("Opening Statement") argues that Gwynn failed to file either a Bill of Costs or a Motion for Fees and Costs Not Taxable By Clerk within 30 days after entry of order of the District Court as required by Local Rule 8014-1(C) and (F). See Opening Statement Pars. 14-16. The District Court Order was entered on March 20, 2006. Gwynn filed both her Motion and her First Summary on April 18, 2006. Thus her filing was timely pursuant to Local Rule 8014-1. Although Gwynn once again failed to use the Local Form "Bill of Costs", the Local Rule requires only that her submission substantially conform to the Local Form. See Local Rule 8014-1 (B) . While Gwynn' s submission does not contain the Local Form Bill of Costs' declaration, the Court finds that her Motion and First Summary were

timely filed and that these submissions contain the substantive information required to be set forth in a Bill of Costs.

Gwynn"s Third Summary of fees and costs seeks taxation of $5,961.44 in appellate costs. The Court finds it appropriate to tax only the appellate costs listed in Rule 8014 and in Part IX "Appellate Costs" of the Court's Guidelines for Taxation of Costs by the Clerk ("Guidelines")that were necessary for the prosecution of Gwynn's appeal. Gwynn' s Third Summary lists the following costs.

1. Consulting attorney's fees (Norman Schroeder, Esq.) $1,000

As discussed above the Court is without authority to award attorney's fees for proceedings before the District Court. In addition, Part IX of the Guidelines do not provide for taxation of consulting attorney's fees.

2. Court Reporter fees for necessary transcripts $2,044.76

At the November 2, 2006 hearing, the Court directed Gwynn to file a written statement explaining why each transcript listed in her Third Summary was necessary for prosecution of her appeal. On November 13, 2006, Gwynn filed a Detailed List of Transcripts Ordered and Explanation of Necessity for Charge Pursuant to this Court's Instructions [C.P. 1827] ("Transcript List] with copies of the transcript invoices attached thereto. On November 24, 2006, Rotella filed Debtor's Response to [Transcript List] [C. P. 1836] in which Rotella maintained that none of the listed transcripts was

necessary for the appeal. In reviewing the parties' submissions, the Court finds that the transcripts for the 4/16/04 hearing and for Rotella's 5/21/04 deposition were not necessary for Gwynn's appeal. As to the remaining transcripts, the Court notes that the Court heard several matters on each of the days indicated. Thus some portions, but not all, of the 4/28/04, 5/28/04, and 4/21/05 transcripts were relevant and necessary for the appeal. The Court finds that the portion of the 4/28/04 transcript dealing with Rotella's Motion to Shorten and that the portion of the 5/28/04 transcript dealing with Rotella's request for sanctions would be necessary for the appeal. However, the Court finds that the portion of the 5/28/04 transcript dealing with Gwynn's Renewed Motion to Disqualify was unnecessary despite Gwynn's argument that the transcript was needed to show the District Court that the Renewed Motion to Disqualify was not frivolous. See Transcript List Par. 5. The District Court's Order was based upon the fact that the Motion for Sanctions was filed after the Court ruled upon the Motion to Disqualify. The District Court's Order did not consider the substantive merits of the Renewed Motion to Disqualify. Therefore it is not appropriate to tax the cost of that portion of the 5/28/04 transcript that deals with the Renewed Motion to Disqualify. In contrast, that portion of the 4/21/05 hearing dealing with liquidating the amount of sanctions would be taxable. The Court notes that the invoices supplied by Gwynn indicate that the transcripts were ordered on an expedited basis. The Court does not find that expedited processing of the transcripts was necessary for the appeal. Thus, based upon Gwynn's submissions, the Court is unable to determine the unexpedited cost of the allowable portions of the 4/28/04. 5/28/04 and 4/21/05

transcripts. Therefore the Court is denying without prejudice Gwynn's request for taxation of transcript costs.

3. Copies by Judicial Research for Designation of Items $428.83 Copy costs for production of copies of items designated on appeal as required by Bankruptcy Rule 8006 are taxable appellate costs pursuant to the Guidelines. At the November 2, 2006 hearing Rotella requested, and Gwynn agreed to within ten days provide statements to Rotella that had not been provided to him previously. The Court, noting that Rotella has made no specific objection to this item, finds that this is an allowable taxable appellate cost in the amount of $428.83.

4. Filing fee for 2 Notices of Appeal[818 & 911] $510.00

The Court finds that these appellate filing fees are allowable taxable appellate costs in the amount of $510.00.

5. Travel Expenses to Miami for Oral Argument $192.00

The Guidelines do no provide for taxation of these costs and therefore the Court finds that they are not taxable.

6. Recording fees for removal of Judgment Lien $233.50 The Court finds this to be an appropriately taxable cost of $233.50 because it is a cost in the nature of discharging bond premiums which are provided for in the Guidelines.

7. Copies of Initial Brief and Appendix and Reply $419.25

Copy costs for production of appellate briefs and appendices required are taxable appellate costs pursuant to the Guidelines. The Court, noting that Rotella has made no specific objection to this item, finds that it is an allowable taxable appellate cost in the amount of $419.25.

8. PACER document retrieval and Westlaw fees $79.10

The Guidelines do no provide for taxation of these costs.

9. Expert Witness Fee (Julianne Frank, Esq.) $1000.00

The Guidelines do no provide for taxation of these costs.

As detailed above, the Court finds that appellate costs incurred by Gwynn in the amount of $1,591.58 are taxable against
Rotella, Rotella, P.A., and the Debtor, jointly and severally,' pursuant to Rule 8014 and Part IX of the Court's Guidelines for Taxation of Costs by the Clerk.

CONCLUSION

The Court does not find it warranted pursuant to Rule 9011 (c) (1) (A) to award attorney's fees and costs to Gwynn for opposing the Motion for Sanctions in this Court. In addition, Rule 9011 (c) (1) (A) does not provide authority for this Court to consider a request for appellate attorney's fees incurred before the District Court. The Court does, however, find it appropriate to tax appellate costs in the amount of

$1,591.58 against Rotella, Rotella P.A., and the Debtor, jointly and severally,[5] pursuant to Rule 8014.

ORDER

The Court, having reviewed the Motion and the applicable law, having taken judicial notice of the docket and proceedings in this case, having heard the argument of counsel and being otherwise fully advised in the premises, hereby

ORDERS AND ADJUDGES that:

1. The Motion is GRANTED IN PART and DENIED IN PART.

2. The Motion to Dismiss is GRANTED IN PART and DENIED IN PART.

3. Gwynn's request pursuant to Rule 9011 for attorney's fees and costs incurred opposing the Motion for Sanctions in this Court is DENIED.

4. Rule 9011 does not authorize this Court to award appellate attorney's fees. Therefore Gwynn's request pursuant to Rule 9011 for attorney's fees incurred on appeal in District Court is DENIED WITHOUT PREJUDICE.

5. Gwynn's request for appellate costs pursuant to Rule 8014 is GRANTED. Appellate costs in the amount of $1,591.58 are taxed against Rotella, Rotella, P.A., and Debtor, jointly and severally.

Footnotes

[1] Notices of Appeal Nos. 818 and 911 were both transmitted to U.S. District Court for the Southern District of Florida on August 5, 2005. The District Court designated Notice of Appeal No. 818 as case no. 05-80714-Civ Gold assigned to the Honorable Alan S. Gold. Notice of Appeal No. 911 was designated as case no. 05-80715-Civ-Altonaga assigned to the Honorable Cecilia M. Altonaga. These two cases were consolidated before Judge Gold under lead case no. 05-80714-CIV-GOLD.

[2] Courts may look to authorities applying Fed. R. Civ. P. 11 standards when determining matters under Bankruptcy Rule 9011, because Fed. R. Civ. P. 11 and Bankruptcy Rule 9011 are substantially identical. See In-re Mroz, 65 F.3d 1567, 1572 (11th Cir. 1995).

[3] Having determined that an award of fees and costs to Gwynn is not warranted pursuant to Rule 9011(c)(1)(A), the Court need not reach the issue of whether Gwynn as a pro se litigant can incur attorney's fees. See Massengale v. Ray, 267 F. 3d 1298 (11th Cir. 2001)(determining award of attorney's fees as a sanction to an attorney representing himself violates the language of Rule 11 because a pro se litigant cannot "incur" attorney's fees).

[4] Despite the Court's repeated admonitions to Gwynn regarding her need to become familiar with, and adhere to, the Court's procedures and rules, at the November 2, 2006 hearing Gwynn failed to produce a proper Local Form "Exhibit Register" as required by Local Rule 9040-1(A). See November 2, 2006 Hearing Transcript at 6-7 [C.P.1834].

[5] At the November 2, 2006 hearing Mr. Gleason argued on behalf of Rotella that Gwynn's Motion was deficient because, among other things, it failed to indicate from whom she sought payment for fees and costs. The Court notes that both sides have engaged in sloppy lawyering. The Court was compelled to research what parties brought which pleadings since movants seem to change without rhyme or reason from pleading to pleading. The Court notes that while Rotella, Rotella P.A. and the Debtor brought the Motion to Shorten and the Motion for Sanctions, it was only Rotella and the Debtor who filed the Motion to Dismiss. Yet at the November 2, 2006 hearing, Mr. Gleason appeared on behalf of Rotella P.A. and Rotella appeared on behalf of the Debtor. The Court finds it appropriate to tax the allowable appellate costs against Rotella, Rotella P.A. and the Debtor, jointly and severally. These are the parties that filed the Motion for Sanctions and these parties opposed Gwynn's Motion. The Court does not find that they are in any way unfairly surprised that Gwynn seeks fees and costs against them.